

Jurisdictional Fact

Kevin M. Clermont

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JURISDICTIONAL FACT

Kevin M. Clermont†

What kind of factual showing must the plaintiff make in order to establish, say, personal jurisdiction? While that question may seem simple enough, real difficulties in regard to the standard of proof arise when there is a similarity of the facts entailed in the jurisdictional determination and those on the merits. Surely, the plaintiff has to do more than allege that the defendant is the author of state-directed acts or omissions. Yet, almost as surely, the plaintiff should not have to prove the cause of action in order to establish jurisdiction. The plaintiff thus must have to show something between allegation and proof.

From a morass of confused cases on this procedural point of significance, this Article draws a startlingly clear rule that covers jurisdictional fact, and much more. On any factual element or legal question of forum authority, from subject-matter jurisdiction to venue whenever properly challenged, the proponent of forum authority must make the usual showing of “more likely than not,” subject to this exception: if that element or question overlaps the merits of the claim, the proponent need provide only prima facie proof to establish the forum’s authority. Depending on the particular threshold issue’s importance, “prima facie” might mean any of the standards below the more-likely-than-not standard, namely, slightest possibility, reasonable possibility, substantial possibility, or equipoise. That lower standard will allow the judge to decide efficiently but definitively whether the forum has authority to decide the merits—doing so without entailing or foreclosing any decision on the merits, a decision to which a higher standard would apply.

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INTRODUCTION

Facts are facts. So, what kind of factual showing must the plaintiff make in order to establish, say, personal jurisdiction in a civil case? Well, proof of such jurisdictional facts would appear to be an ordinary task, subject to the ordinary standard of proof.¹ The ordinary standard of proof—our default rule—is preponderance of the evidence, because it serves the neutral policy of error-minimization.² In theory, then, to prove an issue of jurisdictional fact, the plaintiff must present a preponderance of the evidence.³ If that is so, then why inflict an article on the subject? The reason is that real difficulties with regard to the standard of proof arise whenever a jurisdictional determination entails similar facts as those on the merits determination.

Imagine, for example, that for jurisdiction, the plaintiff alleges commission of an in-state tort by the defendant. In that and many other important situations, it would seem that if—and often, only if—the plaintiff has a winning cause of action will there be jurisdiction. Here, however, what “appears” or “seems” simply cannot be, as a moment’s thought convinces. Instead, the question of determining the applicable standard of proof when jurisdiction and merits overlap becomes a tough call, ultimately turning on obscure authority.

¹ This is not to suggest that the preponderance standard lacks its own many mysteries and problems. See Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1118–21 (1987) [hereinafter Clermont, *Procedure’s Magical Number Three*]; cf. Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002) (comparative study focusing on France); Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT’L L.J. 263 (2004) [hereinafter Clermont, *Standards of Proof in Japan*] (comparative study focusing on Japan). Likewise, there are questions aplenty as to how any standard of proof actually works in practice. See, e.g., *infra* notes 125 & 127.

² See Clermont, *Standards of Proof in Japan*, *supra* note 1, at 270–71; *infra* text accompanying note 114.

³ See, e.g., *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831–32 (5th Cir. 1986), *modified on other grounds*, 836 F.2d 850 (5th Cir. 1988); *Farmer Boys’ Catfish Kitchens Int’l, Inc. v. Golden W. Wholesale Meats, Inc.*, 18 F. Supp. 2d 656, 659 (E.D. Tex. 1998); *New Eng. Welding Contractors, Inc. v. Hydra-Machinery Sales, Inc.*, 704 F. Supp. 315, 315 (D. Mass. 1989); 2 ROBERT C. CASAD & WILLIAM B. RICHMAN, *JURISDICTION IN CIVIL ACTIONS* § 6-1[3][b], at 10–11 & n.21 (3d ed. 1998).

In answering that question, this Article will show that facts are not always simply facts. Jurisdictional facts are *sui generis*, a unique breed deserving procedural treatment different from that given the merits' facts. Just as jurisdictional issues generate their own branch of *res judicata*, the one that goes by the name of "jurisdiction to determine jurisdiction,"⁴ they deserve and get their own standard of proof. Specifically, if any factual (or legal) issue that a court must determine in ascertaining the authority of the forum (whether as a matter of jurisdiction, service, or venue) overlaps the merits, a lower standard of proof prevails for jurisdictional purposes, but not for merits purposes.

Initially, this realization—that these threshold issues fundamentally differ from what look to be identical issues on the merits, and so require different procedures—complicates the law. But ultimately, as I shall try to show, this recognition can work to resolve some of the law's classically difficult puzzlements, including ones concerning jury right, *res judicata*, and collateral attack.

A specific example is indispensable for exposing the problem and suggesting its solution. Consider a set of facts chosen not for its sauciness, but for its power to bare the difficulties. Assume that a woman brings a paternity suit at home in Illinois against an absent man on allegations of in-state impregnation, and that the defendant from Ohio denies the factual allegations. More particularly, Shirley of Illinois has brought a paternity action against Jim of Ohio in an Illinois state court. She claims, in essence, that he sired her child out of wedlock and has failed in his duty to provide support. She alleges, "During the time biologically certain to have been the instant of conception, your Plaintiff had sexual intercourse with your Defendant in Cook County, Illinois, and with no other person." She mentions no other connection of Jim to Illinois. He has received in-hand service of process in Ohio pursuant to the Illinois long-arm statute. Further imagine that the defendant denies that he was "the author of acts or omissions within the state." The defendant says that he attended a big and wild traveling party that began in Gary, Indiana, but in his foggy recollection, he does not think that he ever met the plaintiff or had sex with anyone. He has now, by his attorney, submitted a motion to dismiss for lack of personal jurisdiction, and his papers in support spell out his denial of the complaint's allegations. The defendant's challenge is not to the state's constitutional or statutory reach, but rather to the plaintiff's factual allegations.⁵

⁴ See KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* §§ 4.4(B)(2)–(3), 5.1(A)(1)–(3) (2005) (distinguishing this doctrine from claim and issue preclusion).

⁵ Although there is no constitutional problem on these facts, *see, e.g.*, *Gentry v. Davis*, 512 S.W.2d 4, 6 (Tenn. 1974), courts have differed on whether their state's long-arm statute extends to this situation. *Compare* *Poindexter v. Willis*, 231 N.E.2d 1, 3 (Ill. App. Ct. 1967) (finding jurisdiction under the Illinois statute's provision for "commission of a tor-

Surely, Jim's denial cannot suffice to defeat personal jurisdiction, because that result would effectively repeal the long-arm statute. Just as surely, Shirley must do more than *allege* that the defendant is the author of in-state acts or omissions, because that standard would obviously have all sorts of illogical consequences.⁶ After all, we would probably want to allow a defaulting defendant to raise, say, mistaken identity as a jurisdictional defense when seeking relief from judgment.⁷ If not, we would have created a worldwide service provision, requiring only the plaintiff's say-so to force the defendant to appear.

It is thus clear that this court must actually determine whether jurisdiction exists. What showing, then, must the plaintiff make to establish challenged jurisdiction? She should not have to *prove* her cause of action in order to establish jurisdiction, because that standard would likewise have all sorts of obviously illogical consequences.⁸

tious act within this State"), *enforced*, 256 N.E.2d 254 (Ohio C.P. Montgomery County 1970), *with* Anonymous v. Anonymous, 268 N.Y.S.2d 710 (Fam. Ct. 1966) (finding no jurisdiction under a similar New York statute), *discussed in verse*, David D. Siegel, *Case & Comment*, in *Vagrant Verse*, CASE & COMMENT, Sept.-Oct. 1971, at 56, 63. *See generally* James O. Pearson, Jr., Annotation, *Long-Arm Statutes: Obtaining Jurisdiction over Nonresident Parent in Filiation or Support Proceeding*, 76 A.L.R.3d 708 (1977) (discussing the division among cases on the issue). Note that today, more than half the states' statutes would reach specifically this kind of case, including the special provision that New York enacted in 1997 as N.Y. FAM. CT. ACT § 580-201(6) (McKinney 2005) ("the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse") to change the *Anonymous* case's result. *See* 1 CASAD & RICHMAN, *supra* note 3, § 4-2[2][a][i], at 442 n.227, [7]; 2 *id.* § 9-2[6]. Indeed, Illinois today has a similarly specific long-arm statute, but one that also contains a catch-all provision that reaches to the limits of due process. *See* 735 ILL. COMP. STAT. § 5/2-209 (2005) (containing the somewhat redundant clauses (a)(6) and (a)(8) derived from separate but simultaneous bills). *See generally* Keith H. Beyler, *The Illinois Long Arm Statute: Background, Meaning, and Needed Repairs*, 12 S. ILL. U. L.J. 293 (1988).

Note also that analogous cases arise in connection with "tortious dumping" of children. *See* Gary N. Skoloff, *Stretching the Long-Arm Statute in Support of "Dumped" Children*, NAT'L L.J., July 1, 1985, at 21.

⁶ Even so, there is some case support for the position that mere allegations do suffice. *See, e.g.*, Schermerhorn v. Hoiland, 337 N.W.2d 692, 693-94 (Minn. 1983) ("In other words, at this juncture, we take as true that defendant Raymond Johnson was a co-owner of the plane with defendant Loren Nogosek, who at relevant times was a Minnesota resident, and that the negotiations for the sale of the airplane to Minnesota plaintiffs were initiated by defendant Johnson's co-owner in Minnesota. . . . Here the plaintiffs have alleged facts that, if true, show that defendant Johnson purposely availed himself, through his co-owner, of the privilege of conducting activities within Minnesota."). Indeed, in this confused area, one can find case support for just about any position.

⁷ *See* Jackson v. FIE Corp., 302 F.3d 515, 524 (5th Cir. 2002) (deciding to allow attack, while observing: "To prove that the judgment was void for lack of personal jurisdiction, Fratelli Tanfoglio raises an assertedly meritorious defense (identity of the pistol's manufacturer) that the district court's default judgment on the merits had flatly rejected. Because the identity of the pistol's manufacturer has ramifications for both jurisdiction and the merits, the 'foundational principle' embodied in Rule 60(b)(4) collides head-on with a well-established rule of claim preclusion.").

⁸ Even so, there is some case support for this position. *See, e.g.*, H.V. Allen Co. v. Quip-Matic, Inc., 266 S.E.2d 768, 769 (N.C. Ct. App.) (2-1 decision) ("The only possible

A preliminary hearing on jurisdiction would entail a full-dress trial on the merits as to all issues of liability, with troublesome judge/jury problems and difficult *res judicata* or law-of-the-case implications.⁹ If the defendant won that hearing, he would get not a conclusive judgment on the merits but only a dismissal for lack of jurisdiction; and meanwhile, he would have relinquished his right not to have to litigate the merits in that forum.¹⁰ If he instead defaulted, he could force a trial on all the issues of liability in his home state because these would be jurisdictional facts subject to collateral attack; and thus the statutory objective of forcing the defendant, when appropriate, to defend his conduct in the state where it took place would be nullified.¹¹

The answer, therefore, must lie in requiring the plaintiff to show the court something between mere allegation and full proof. This Article, in Part I, will develop the simple answer in the exemplary context of personal-jurisdictional fact. Then, in Part II, it will show that this answer broadly applies to all factual and legal questions of forum authority, from venue to subject-matter jurisdiction.

subsection which might apply in the instant case is subsection (1)[: 'any cause of action arising . . . [o]ut of any contract made in this State or to be performed in this State']. Yet the record fails to show that a contract was ever made in North Carolina between plaintiff and defendant. Plaintiff certainly alleged that a binding contract was entered into, but defendant vigorously denied any contract. It cannot be conclusively stated that a contract was made at all, and therefore this subsection is inapplicable."), *appeal dismissed*, 273 S.E.2d 298 (N.C. 1980).

⁹ See *N. Am. Video Corp. v. Leon*, 480 F. Supp. 213, 216 (D. Mass. 1979) ("If the [preponderance] course were undertaken, the court might be deciding key fact issues that, if the doctrine of estoppel were not applied, would be resubmitted for jury determination at trial, thus making wasteful use of scarce judicial resources and also creating a possibility of inconsistent findings by the court on motion and the jury at trial. If estoppel were applied on the basis of the court's resolution of the issues, thereby precluding waste and inconsistency, then either the court must impanel a jury just to try those issues for disposition of the motion—a dubious procedure at best—or else the parties would effectively be denied jury trial on those issues because the court's findings on them when determining the motion would preclude their resubmission at jury trial."). For explanation and resolution of these problems, see *infra* text accompanying notes 63–67 (jury problems) and notes 68–72 (preclusion problems).

¹⁰ See, e.g., *H.V. Allen Co.*, 266 S.E.2d at 769, 772 (reversing the lower court's decision for the defendant on the merits and dismissing on jurisdictional grounds).

¹¹ Again, these dread consequences are not fanciful, as confused courts sometimes do allow lowly merits to be litigated under the guise of a collateral attack for lack of personal jurisdiction. See, e.g., *Pardo v. Wilson Line of Wash., Inc.*, 414 F.2d 1145, 1149–50 (D.C. Cir. 1969) (allowing defendants who had defaulted to prove there had been no fraudulent transfer within the long-arm statute); cf. *Temtex Prods., Inc. v. Brock*, 433 So. 2d 942, 944 (Miss. 1983) (allowing defendant who had defaulted to prove that she had not signed a contract within the long-arm statute, without discussing standard of proof).

I

SIMPLICITY OF THE STANDARD OF PROOF FOR PERSONAL-
JURISDICTIONAL FACT

Apparently, the case law's solution is to require the plaintiff, upon challenge, to make a "prima facie" showing on jurisdictional facts that overlap the merits.¹² Courts apply the prima facie standard either to deny jurisdiction or to uphold it.¹³

Lots of cases throw around this term and idea of prima facie proof of jurisdiction.¹⁴ But few judges bother to define prima facie. This traditionally vague phrase requires the plaintiff to establish a "non-trivial possibility" that the jurisdictional facts exist and that therefore the alleged scenario took place.¹⁵ So, it is clear that prima facie

¹² See, e.g., *Institutional Food Mktg. Assocs. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 455 (8th Cir. 1984) (affirming pretrial dismissal for lack of jurisdiction, and observing: "FMA and FSS have failed to make a *prima facie* showing of an essential element of tortious interference with a contract: 'absence of justification.'"); *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982) (affirming pretrial dismissal for lack of jurisdiction, and observing that plaintiff "need not, however, establish personal jurisdiction by a preponderance of the evidence; *prima facie* evidence of personal jurisdiction is sufficient"), *reh'g denied with opinion*, 712 F.2d 1002 (5th Cir. 1983); *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491 (5th Cir. 1974) (affirming pretrial dismissal for lack of jurisdiction, and observing that "the task required only a prima facie showing of the facts on which jurisdiction was predicated"); *Block Indus. v. DHJ Indus.*, 495 F.2d 256, 259 (8th Cir. 1974) (affirming pretrial dismissal for lack of jurisdiction, and observing: "Although a plaintiff seeking to predicate long-arm jurisdiction on the accrual of a tort action within the forum state need not make a full showing on the merits that the nonresident defendant committed the tort, a prima facie showing is required to defeat a motion to dismiss for want of jurisdiction."); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1067.6, at 538 n.5, 559 n.13 (3d ed. 2002) (collecting cases that require prima facie showing); 5B *id.* § 1351, at 274-99 (3d ed. 2004).

¹³ The cases cited *supra* note 12 all involved easy dismissal for jurisdiction clearly lacking, but many cases uphold jurisdiction upon a prima facie showing. See, e.g., *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 69 F. Supp. 2d 408, 414 (W.D.N.Y. 1999) (upholding jurisdiction on pretrial motion, under prima facie standard); *Walker v. Univ. Books, Inc.*, 382 F. Supp. 126, 130 (N.D. Cal. 1974) (same); *United Barge Co. v. Logan Charter Serv., Inc.*, 237 F. Supp. 624, 631 (D. Minn. 1964) (same); *cf. infra* note 79 (citing cases that apply prima facie only at pretrial).

¹⁴ Commentators too invoke the prima facie standard for jurisdiction. See, e.g., 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1068, at 250 (1st ed. 1969) (making the point in a single sentence: "To avoid precipitating too extensive an investigation of the merits at this stage of the litigation, only a prima facie showing is required on a jurisdiction motion."—which was carried over to *id.* at 345 (2d ed. 1987) but omitted in the current edition, when revisers perhaps lost sight of the point's significance).

¹⁵ See *United Barge Co.*, 237 F. Supp. at 631 (upholding jurisdiction on pretrial motion, and observing: "The acts which are relied on to give the Court jurisdiction need only have raised a non-trivial possibility that the defendant will be found to have committed a tort. Otherwise the statute would face serious objections under the due process clause.").

requires less of a showing than that required by the normally prevailing standard of proof,¹⁶ but it is unclear how much less.¹⁷

Few judges face the need to trace the implications of their statements about a *prima facie* standard. The reason would seem to be that its application comes most often upon pretrial determination, when the judges can invoke the frequently quoted *prima facie* standard without much thought or discussion. If the plaintiff fails to meet that low standard, dismissal is usually the easy result. If the case survives dismissal and goes to trial, the defendant who can defeat the case on the merits no longer pushes the jurisdictional point, because the defendant prefers a victory on the merits to a jurisdictional dismissal. In the rarer scenario of a defaulting defendant who later seeks relief from judgment, the reported cases seem not to focus on the applicable standard of proof, concentrating instead on the possibly shifting burden of proof.¹⁸

Thus, few courts need openly to maintain that even after pretrial, the standard of proof for jurisdiction remains low—or at least it is true that few courts do so. Yet precisely this constancy of the lower standard, from a case's beginning to its end, is the telling feature of *prima facie* proof in this context: Whenever a critical jurisdictional fact overlaps the merits, the *prima facie* standard should remain the standard of proof of that fact for jurisdictional purposes throughout the proceedings. As this Article will develop, the *prima facie* standard should prevail even on a challenge at or after trial. If the plaintiff can make that lowered showing, then jurisdiction exists. If the plaintiff fails to

¹⁶ See *Johnson v. California*, 545 U.S. ___, 125 S. Ct. 2410, 2413–14, 2416 (2005) (holding that a *prima facie* showing of a violation under *Batson v. Kentucky*, 476 U.S. 79 (1986), requires less than “more likely than not”).

¹⁷ In describing judge-jury relations, “*prima facie*” may refer to either a permissible inference or a mandatory presumption. See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981). In describing a standard of proof, “*prima facie*” becomes even more flexible. See *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003) (“At the outset, we consider the meaning of the statutory term ‘*prima facie* showing.’ Other courts of appeals differ over whether this is an exacting requirement or a relatively lenient one. Compare, e.g., *Rodriguez v. Superintendent*, 139 F.3d 270, 273 (1st Cir. 1998) (characterizing the *prima facie* showing as ‘a high hurdle’), with, e.g., *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (per curiam) (stating that [this habeas corpus statute] does ‘not [establish] a particularly high standard’).”); *Laser Indus. v. Reliant Techs.*, 167 F.R.D. 417, 425 (N.D. Cal. 1996) (discussing the showing required for crime/fraud exception to attorney-client privilege and saying that “the phrase ‘*prima facie* showing’ or ‘*prima facie* case’ can mean different things in different environments—and courts must take care not to answer the difficult question we address in this section on the basis of circular reasoning that is driven by a definition of ‘*prima facie*’ that was developed in other settings to serve other purposes”), *appeal dismissed*, 232 F.3d 910 (Fed. Cir. 2000).

¹⁸ See *infra* note 53.

show the related factual element by a preponderance at trial, then the plaintiff will lose, but lose on the merits.¹⁹

A. The Two Leading Cases on Prima Facie Proof of Jurisdictional Fact That Overlaps Merits

One of the most famous pioneering state court long-arm decisions perceived the problem of standard of proof and very intelligently discussed it. *Nelson v. Miller* upheld the new Illinois jurisdictional statute in an action for personal injury from alleged negligence in unloading a truck in Illinois, during delivery of a stove by the Wisconsin defendant's employee.²⁰ In reversing a successful special appearance, the Illinois Supreme Court said sweepingly that the entire statute reflected "a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause."²¹

Significantly, the defendant in *Nelson* contended that jurisdiction under the statutory words "commission of a tortious act within this State"²² depended upon proof of all the elements necessary to spell out ultimate liability in tort.²³ The court rejected this contention, holding that the jurisdictional requirement was met "when the defendant, personally or through an agent, is the author of acts or omis-

¹⁹ See 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][c], at 14-15 (giving by far the best discussion of the problem, but doing so in one paragraph and citing only one case: "When the issue upon which jurisdiction depends is also an issue going to the substantive merits, the best approach might be to adopt as the standard of proof on the jurisdiction questions some measure such as 'reasonable likelihood,' or some similar measure short of absolute proof. Such a standard could be applied once and for all at the threshold of the action without an extensive factual inquiry. Satisfaction of that standard would mean that the defendant is subject to jurisdiction. The issue would not be held in abeyance pending trial. This approach would avoid the anomaly of a possible dismissal for want of jurisdiction—a judgment not on the merits—after the merits have been fully litigated. The threshold standard would have to be demanding enough to protect substantially the defendant's right not to have to defend in that forum if the conditions warranting jurisdiction do not exist. This is the way the problem was resolved by the federal court in Massachusetts. In that case, the trial court denied the defendant's motion to dismiss at the outset of the action, finding that the plaintiff had made a prima facie showing of fraud sufficient to bring the defendant under the long-arm statute. At trial, the jury found that no fraud had been committed, but found for the plaintiff on a contract count. The defendant's claim that the action should be dismissed for want of jurisdiction was denied. The court's earlier ruling was final on the jurisdiction question." (citing *Val Leasing, Inc. v. Hutson*, 674 F. Supp. 53 (D. Mass. 1987)); see also 1 *id.* § 4-2[2][a][iii] (discussing related points); cf. Adolf Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 BUFF. L. REV. 61, 84-87 (1965) (recognizing the possibility of a lower standard of proof). But see John E. Amerman, Recent Decision, 42 NOTRE DAME LAW. 273 (1966) (criticizing *United States v. Montreal Trust Co.*, 358 F.2d 239, 242 (2d Cir. 1966), a case that applied the prima facie standard).

²⁰ 143 N.E.2d 673, 675, 682 (Ill. 1957) (Schaefer, J.).

²¹ *Id.* at 679.

²² 735 ILL. COMP. STAT. § 5/2-209(a)(2) (2005).

²³ See 143 N.E.2d at 680.

sions within the State, and when the complaint states a cause of action in tort arising from such conduct.”²⁴ The court explained:

The word “tortious” can, of course, be used to describe conduct that subjects the actor to tort liability. . . . It does not follow, however, that the word must have that meaning in a statute that is concerned with jurisdictional limits. To so hold would be to make the jurisdiction of the court depend upon the outcome of a trial on the merits. There is no indication that the General Assembly intended a result so unusual. The essential question in cases of this type is where the action is to be tried. Once it has been determined that the relationship of the defendant to the State is sufficient to warrant trial here, we are of the opinion that the court has jurisdiction to determine the merits of the controversy, and that its jurisdiction will not be destroyed by its exercise.²⁵

The *Nelson* court further explained that the rejected construction of the statute “would produce anomalous results.”²⁶ First, a preliminary hearing on jurisdiction would entail a full-dress trial on the merits as to all issues of liability; and thus the system would incur waste:

And if, upon that preliminary hearing the court should find liability for jurisdictional purposes, it would nevertheless be necessary to retry all the issues relating to liability in order to determine the merits of the case, because “No determination of any issue of fact in connection with the objection [to jurisdiction] is a determination of the merits of the case or any aspect thereof.” Civil Practice Act, sec. 20(2); Ill. Rev. Stat. 1955, chap. 110, par. 20.²⁷

Second, if the defendant won on his special appearance, he would get not a judgment on the merits but only a dismissal for lack of jurisdiction; and thus the defendant would suffer disadvantage:

A dismissal for want of jurisdiction, after a finding on the preliminary hearing that liability in tort had not been established, might not protect the nonresident defendant from a subsequent suit on the same cause of action in his home State, because under section 20(2) the judgment of dismissal will not determine the merits. Cf. Restatement, Judgments, § 49 [“Judgment For Defendant Not On The Merits”]. Thus the defendant who successfully litigated the issue of liability for jurisdictional purposes in our courts might be

²⁴ *Id.* at 681.

²⁵ *Id.* at 680.

²⁶ *Id.* at 681.

²⁷ *Id.*; see *Stansell v. Int'l Fellowship, Inc.*, 318 N.E.2d 149, 152 (Ill. App. Ct. 1974). The quoted Illinois statute, providing against preclusion, now appears as 735 ILL. COMP. STAT. § 5/2-301(b) (2005). The same, unusual provision appears in TEX. R. CIV. P. 120a(2).

subjected to a second trial of the issue on the merits in the courts of another State.²⁸

Third, if the defendant instead defaulted, he could later force a trial on all the issues of liability by seeking relief from the default judgment, because these issues would also be jurisdictional facts subject to attack; and thus the plaintiff would suffer disadvantage:

The substantial objective of the new jurisdictional provisions is to enable the plaintiff to obtain a trial of the issues of liability and of damages in this State, when the circumstances make it the appropriate and convenient forum for that purpose. Under the suggested construction, however, the nonresident defendant, merely by defaulting, could force trial of the issue of liability in his own State, under the guise of a trial of the jurisdictional facts. We think that the General Assembly did not intend that the jurisdiction . . . could be frustrated by a disregarding of the court's process.²⁹

After *Nelson*, other state and federal courts slightly refined these insights to shape the prima facie standard of proof, which, as I have explained, applies to jurisdictional facts overlapping the merits.³⁰ But curiously, the problem's depths seemed to disappear from view.

Indeed, during the subsequent years, the sole perceptive discussion came in the District of Massachusetts case of *Val Leasing, Inc. v. Hutson*.³¹ In that case, a horse trailer owner sued in contract and tort for inadequate renovation of the trailer.³² Jurisdiction rested solely on alleged fraud during a telephone call from the defendant in Arkansas to the plaintiff in Massachusetts.³³ On pretrial motion, the court upheld jurisdiction.³⁴ But at trial, the jury rejected the fraud count, while finding for the plaintiff otherwise.³⁵ So the defendant renewed his jurisdictional objection by means of a motion for judgment notwithstanding the verdict.³⁶

The *Val Leasing* court said, as background,

²⁸ *Nelson*, 143 N.E.2d at 681; see *Val Leasing, Inc. v. Hutson*, 674 F. Supp. 53, 55 n.2 (D. Mass. 1987) ("Indeed, it is somewhat surprising that Hutson would argue that the Court should re-apply the long arm statute to the facts as found by the jury. Under this theory the Court would have to find that jurisdiction never existed and dismiss the case on jurisdictional grounds. This would rob Hutson of the *res judicata* benefit of his fraud verdict, since he would have no final adjudication on the merits. The implausibility of permitting such a barrier to finality is a perfect example of why the jury's ultimate factual determination is irrelevant to the correctness of the initial ruling.").

²⁹ 143 N.E.2d at 681.

³⁰ See *supra* notes 12-13 and accompanying text.

³¹ 674 F. Supp. 53, 54-55 (D. Mass. 1987) (Young, J.) (observing that this problem of establishing jurisdictional fact "is the subject of careful analysis in but few opinions").

³² See *id.* at 54.

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.*

that, when personal jurisdiction is challenged, a plaintiff must establish a “threshold” showing of jurisdiction but no more. That is, through affidavits and other competent evidence, a plaintiff must make out a *prima facie* case for the existence of personal jurisdiction, demonstrating at minimum that there is competent evidence to support each of the relevant jurisdictional prerequisites.³⁷

Then, the district judge followed his premise to its logical conclusion:

Given this framework, there is nothing inconsistent between the ruling of the motion judge that Val Leasing had put forward a *prima facie* case for the exercise of personal jurisdiction, and the subsequent verdict in favor of Hutson on the fraud count after a trial on the merits. Thus, to the extent that Hutson thinks that the jury’s resolution of the disputed fact issues requires this Court to “re-think” the earlier denial of the motion to dismiss, he clearly is wrong.³⁸

In other words, whenever a jurisdictional fact overlaps the merits, the *prima facie* standard should remain the standard of proof of that fact for jurisdictional purposes throughout the proceedings, even on a challenge after trial. The jurisdictional fact is different in kind from the merits fact:

It follows, therefore, that the determination by a trial judge that the court has personal jurisdiction over a defendant does not purport to settle any disputed factual issues germane to the underlying substantive claim. What is settled is the court’s power to exercise personal jurisdiction over a defendant, nothing more. Were this not the case, a plaintiff would be precluded by a preliminary judicial ruling from litigating disputed facts germane to the underlying substantive claim—surely a grave encroachment on the right to trial by jury guaranteed by the Seventh Amendment.³⁹

A singular feature of *Val Leasing* was the involvement of supplemental service, or pendent personal jurisdiction as the court called it.⁴⁰ Long-arm jurisdiction for the unsuccessful fraud count was the sole basis of jurisdiction for the other counts.⁴¹ “The question, then, [was] whether the judgment for Hutson (after trial on the merits) on the ‘anchor’ claim of fraud removes the foundation for exercising jurisdiction with respect to the ‘pendent’ claims.”⁴² The judge held that personal jurisdiction persisted.⁴³ In other words, the loss on the merits of the fraud count nonetheless left intact jurisdiction for that fraud

³⁷ *Id.* at 55.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See id.* at 56.

⁴¹ *See id.*

⁴² *Id.*

⁴³ *See id.*

count and, hence, for the other counts. And, in still other words, the judge thereby demonstrated a sincere belief in his conclusion that jurisdictional fact differs in kind from any overlapping merits fact and so deserves a different standard of proof.

B. Fleshing Out the Doctrinal Detail

1. *Procedural Settings for Decision on Jurisdiction*

To flesh out the definition and implications of the *prima facie* standard of proof, one must first examine the procedural settings in which the jurisdictional issue will arise.⁴⁴ By bringing any action, the plaintiff asserts, at least implicitly, that the court has jurisdiction and is a proper venue, and that the plaintiff will properly notify the defendant.⁴⁵ But sooner or later, the defendant may dispute the plaintiff's position and so create a contested issue.

In the ordinary course of the initial action, the defendant can challenge the plaintiff's implicit or explicit assertions of forum authority, but must do so by raising any personal defense early and in a way that avoids waiver.⁴⁶ If the defendant does raise any of the forum-authority

⁴⁴ See generally CLERMONT, *supra* note 4, §§ 4.4, 5.1(B)(1) (summarizing various procedural incidents).

⁴⁵ All these procedural incidents are similar in federal and state court. Certain states, however, require specific pleading of the basis for long-arm jurisdiction, and some of these states will then impose the burden on the defendant to disprove jurisdiction. See 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][a]–[b].

As to federal court subject-matter jurisdiction, the party invoking federal jurisdiction must affirmatively allege the grounds upon which that jurisdiction depends. See 28 U.S.C. § 1446(a) (2000) (notice of removal); FED. R. CIV. P. 8(a)(1) (complaint). At any time in the ordinary course of the federal action, including appeal, any party may challenge federal jurisdiction, and the trial or appellate court should on its own motion dismiss for lack of subject-matter jurisdiction when perceived; thus, even the party who invoked jurisdiction may challenge such jurisdiction on appeal. See FED. R. CIV. P. 12(b)(1), (h)(3). If challenged, the party relying on federal jurisdiction will bear the burden of showing that such jurisdiction exists. See *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). Being courts of limited jurisdiction, the federal courts apply such subject-matter jurisdiction requirements somewhat more strictly than do most state courts. See CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* §§ 7, 69 (6th ed. 2002); see also RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. d (1982).

⁴⁶ The defendant must be very careful to follow precisely the specified procedural steps, making immediately clear that he is appearing specially to challenge territorial authority to adjudicate, notice, or both, and that he is not appearing generally. See RESTATEMENT (SECOND) OF JUDGMENTS § 10 cmt. b (1982). The correct steps vary from state to state. See *id.* In federal court, the "special appearance" is less formalistic, instead coming in the form of a Rule 12(b) defense:

- "lack of jurisdiction over the person" under Rule 12(b)(2), which is read to cover all of the defense of lack of territorial jurisdiction;
- "improper venue" under Rule 12(b)(3);
- "insufficiency of process" under Rule 12(b)(4), which covers defects in the form of the summons; and
- "insufficiency of service of process" under Rule 12(b)(5), which covers defects in the manner of transmitting notice.

defenses, the court must pass on them. So much for the burden of allegation. The burdens of production and persuasion on these threshold issues will be on the plaintiff (except as to the unreasonableness test for territorial jurisdiction).⁴⁷ The parties receive a reasonable opportunity for discovery on any reasonably contestable issue of forum authority.⁴⁸ The judge may (1) hear and determine the defense in a pretrial proceeding on the application of any party or (2) choose to defer the issue until trial.⁴⁹ The judge determines the issue on documentary proof and affidavits and, if necessary, after an evidentiary hearing.⁵⁰

Subsequent to the ordinary course of the initial action, in certain circumstances that usually involve default in that initial action, an aggrieved person can raise the more serious forum-authority defenses by seeking relief from judgment through direct or collateral attack.⁵¹

See FED. R. CIV. P. 12(b). The federal defendant must raise any such available defenses at the very outset, either in a Rule 12(b) motion or in the answer, whichever comes first. See FED. R. CIV. P. 12(h). With some risk, the defendant may first engage in certain preliminary procedural maneuvers, such as moving for an extension of time to respond. See FED. R. CIV. P. 6(b). But if the defendant first does anything more substantive, he waives those threshold defenses. See FED. R. CIV. P. 12(h)(1). Indeed, even after properly asserting such defenses, the defendant may waive them by inconsistent activity, such as by asserting a permissive counterclaim. See, e.g., *Dragor Shipping Corp. v. Union Tank Car Co.*, 378 F.2d 241, 244–45 (9th Cir. 1967).

⁴⁷ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985) (instructing that while the plaintiff has the burden as to power, it is up to the defendant to show unreasonableness—thus changing a natural-sounding reasonableness test into a somewhat grammatically challenging unreasonableness test, which then operates as a counterpoint to the power test).

Also, as to venue, there exists some dispute over who bears the burden of proof. See 2 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 12.32[4] (3d ed. 2005); 5B WRIGHT & MILLER, *supra* note 12, § 1352, at 320–22 (favoring the majority rule of burdening plaintiff).

⁴⁸ See 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][b], [d].

⁴⁹ See *id.* § 6-1[3][b], at 9 & n.17, 13–14 & n.25. In federal court the governing provision is FED. R. CIV. P. 12(d).

Additionally, in the post-trial period, a defense of lack of federal subject-matter jurisdiction will be determined whenever raised in the ordinary course of the initial action, including on appeal. See *supra* note 45.

⁵⁰ See 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][b].

⁵¹ Relief from judgment refers to procedural techniques, other than in the ordinary course of review in the trial and appellate courts, for avoiding the effects of the judgment. See *id.* § 6-2. It encompasses three major techniques: motion for relief, independent suit, and collateral attack. First, a party may attack a judgment in the rendering court by a motion for relief from judgment. See *id.* § 6-2[1][a]. This extraordinary motion is technically considered a continuation of the initial action. See *id.* It is the preferred means of overturning a judgment, being the most direct and orderly technique. Second, if adequate relief from judgment is unavailable by motion because of any applicable procedural limitations on use of such motion, a person may bring an independent suit against the judgment-holder to nullify or enjoin the enforcement of the judgment. See *id.* § 6-2[1][e]. The essence here is a separate claim in equity, but one aimed directly at the prior judgment. See *id.* This suit is preferably, but not necessarily, brought in the rendering court, which can exercise continuing jurisdiction. Third, if someone in a subsequent action relies on a

The procedural incidents of such a challenge remain much the same as those just described, except for the burden of proof. Upon an attempt at relief from judgment by attacking its validity, the attacker normally bears the burden.⁵² That is, in this late post-judgment setting, the presumption shifts in favor of validity—and consequently, the burden of proof would be on the attacker to establish invalidity, rather than on the proponent of the judgment to show validity.⁵³

prior judgment as a basis for claim or defense, as in a subsequent action where the plaintiff sues upon the judgment to enforce it or where the defendant pleads *res judicata*, the opponent may in that subsequent action attack the judgment to prevent its use. *See id.* § 6-2[2]. The court will entertain this attack if adequate relief by one of the other procedural techniques is not available and more convenient. *See id.* This third technique is most often called a collateral attack, distinguishing it from the direct attacks that come as a challenge to a judgment in a proceeding brought specifically for that purpose. *See id.* § 6-2.

⁵² *See id.* § 6-2[1][b], [e], [2][a][i].

⁵³ *See id.* While this proposition goes largely unquestioned as to collateral attack and even independent suit, some courts resist the proposition with respect to motions for relief from judgment. *See id.* § 6-2[1][b], at 32 & n.93, [e], at 36 & n.106, [2][a][i], at 41 & n.119. Yet even here, the better—and by now, majority—view is that finality interests dictate shifting the burden of proof to the attacker, at least if the attacker had knowledge of the prior action. *See, e.g.,* Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 401 (7th Cir. 1986) (quoting Rohm & Haas Co. v. Aries, 103 F.R.D. 541, 544 (S.D.N.Y. 1984), for the proposition that “a defendant who was on notice of the original proceedings, had an opportunity, at that time, to oppose jurisdiction by a Rule 12 motion. Such a motion avoids prejudice to the plaintiff because all evidence needed to prove jurisdiction is readily available.”); Coshatt v. Calmac Mfg. Corp., 602 P.2d 845, 846 (Ariz. Ct. App. 1979) (finding it unnecessary for a trial court to make an express determination in the record regarding the “fairness” of its jurisdiction before entering a default judgment against a nonresident corporation, because after judgment, there is a presumption of jurisdiction that the attacking party must overcome). *But see* Ariel Waldman, Comment, *Allocating the Burden of Proof in Rule 60(b)(4) Motions to Vacate a Default Judgment for Lack of Jurisdiction*, 68 U. CHI. L. REV. 521, 536 (2001) (arguing that courts should place the burden on the movant but “should condition the remedy to mitigate any resulting inequities”).

Although courts tend not to focus on the following subtlety, the best view would be that only the burden of production shifts to the attacker, while the proponent of the judgment retains the burden of persuasion (which means the risk of nonpersuasion, including the risk of indeterminacy). That is, the *attacker* must produce proof that the *proponent* cannot show validity under the relevant standard of proof. *See* Hansen v. Pingnot, 739 P.2d 911, 913 (Colo. Ct. App. 1987) (“[A]t the hearing in Colorado, Pingnot tendered an affidavit which states that he did not transact any business within the State of Missouri. Hansen offered no evidence to the contrary. Under these circumstances, we conclude that Pingnot’s affidavit was sufficient to rebut the presumption of valid jurisdiction”); Davis v. Nehf, 302 N.E.2d 382, 385–87 (Ill. App. Ct. 1973) (on collateral attack, defendant introduced evidence of lack of jurisdiction, but plaintiff had burden of persuasion); Jackson v. Randall, 544 S.W.2d 439, 441 (Tex. App. 1976) (finding that the attackers had the “burden of going forward with the evidence”). Thus, if the standard of proof is preponderance, and if the attacker has shown equipoise (which is a fuzzy range rather than a point of probability) while the proponent cannot push back the evidence, the attack succeeds. *See* Clermont, *Procedure’s Magical Number Three*, *supra* note 1, at 1122 n.36. The reason would be that the defendant, who has a right to default in an action without jurisdiction, should not have to prove by a preponderance that jurisdiction in fact does not exist. The defendant should have to prove no more than that the plaintiff cannot show jurisdiction to exist. So, if neither the plaintiff nor the defendant can show, respectively, that jurisdiction does or does not exist, then the defendant prevails. That is, the defendant should have to pro-

2. *Applying the Standard of Proof*

The appropriate burden and standard of proof on personal-jurisdictional issues of fact are the same in both state courts, as in *Nelson*, and federal courts, as in *Val Leasing*. Perhaps, as a group, the former set of courts to date has focused even less on the problem and so shown more confusion.⁵⁴ Probably, the latter should come to its own independent resolution of the problem, as the majority of the few authorities who have perceived the *Erie* question say that federal law controls the burden and standard of proof on personal jurisdiction in

duce evidence, but should not have to assume the risk of indeterminacy simply because he defaulted. The easiest way to express this compromise is to say that the plaintiff retains the burden of persuasion.

This very subtle distinction between production and persuasion might help to reconcile the above-described disagreement in the cases as to which side has the burden of proof on a motion for relief from judgment. After all, both attacker and proponent bear the burden of proof, the former having the initial burden of production and the latter having the ultimate burden of persuasion. Thus, some of the cases cited as being in conflict by Theresa L. Kruk, Annotation, *Who Has Burden of Proof in Proceeding Under Rule 60(b)(4) of Federal Rules of Civil Procedure to Have Default Judgment Set Aside on Ground That It Is Void for Lack of Jurisdiction*, 102 A.L.R. Fed. 811 (1991), may in fact be saying more or less the same thing. Compare *Bally Export Corp.*, 804 F.2d at 401 (affirming the lower court's finding that attackers "had submitted to Illinois jurisdiction by transacting business with Bally in Illinois," although cited as putting the burden on the attacker), with *Packard Press Corp. v. Com Vu Corp.*, 584 F. Supp. 73, 75-76 (E.D. Pa. 1984) (reasoning, even though cited as putting the burden on the proponent, "The defendant has set forth *prima facie* meritorious defenses. . . . When the court's *in personam* jurisdiction is challenged by the defendant, the plaintiff must prove that the non-resident defendant's activities in the forum state are sufficient to bring it within the reach of this court's jurisdiction."). In any event, the subtle distinction nicely explains *China Mariners' Assurance Corp. v. M.T. W.M. Vacy Ash*, No. 96 CIV. 9553 (PKL), 1999 WL 126921 (S.D.N.Y. Mar. 9, 1999). There the court's premise under Rule 60(b)(4) was that the "[d]efendant bears the burden of establishing its claims for setting aside the default judgment, and must therefore show that service was not properly effected." *Id.* at *3. But the court concluded:

Unfortunately, the parties' accounts of service cannot be reconciled. Failing to describe the critical facts of the process server's alleged service at the Coral Gables address, plaintiff has not done enough to rebut defendant's claim of improper service. . . .

The highly controverted story behind service in this case leads the Court to the somewhat reluctant conclusion that the default judgment entered against defendant is void. . . . This Court has recently pronounced that . . . "where the parties' accounts of the attempted service differ but both are inherently plausible, and there is nothing in the record upon which to judge the veracity of either version, a court should credit the version of the party seeking to vacate the default."

Id. at *6-*7 (quoting *American Inst. of Cert. Pub. Accts. v. Affinity Card, Inc.*, 8 F. Supp. 2d 372, 377 (S.D.N.Y. 1998)).

⁵⁴ See, e.g., *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307, 1310 (Utah 1980) (relying on federal precedent to conclude, over dissent, that "plaintiff should not be required to prove all of the merits of his case in a hearing designed for the purpose of determining jurisdiction").

federal court.⁵⁵ Still, no principle differentiates here between federal and state courts.

Moreover, the burden and standard of proof on such jurisdictional issues are matters on which the judge is largely free from constitutional or statutory restriction.⁵⁶ In this Article, I shall describe what the better judges do in exercising that freedom, or would do when real effects turned on the burden or standard of proof. Admittedly, even most of the better judges have ruled intuitively and without the understanding necessary for cogent definition or for vision of the implications.

All courts, then, should apply the prima facie standard of proof whenever a jurisdictional fact overlaps the merits.⁵⁷ "Overlapping" here means that a factual finding in establishing personal jurisdiction would also go toward proving the merits of the claim, with "merits" broadly meaning those issues that arise other than in determining the forum's authority.⁵⁸

⁵⁵ See, e.g., *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 n.3 (8th Cir. 1982) ("[T]he question of burden of proof of personal jurisdiction in the federal courts is not controlled by state law."); *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489-91 (5th Cir. 1974) (applying federal law to burdens of production and persuasion, and apparently to specification of prima facie standard of proof too); 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][b], at 9 n.17. This majority view presumably relies on the premise that FED. R. Civ. P. 4(k), 12(b) & (d), and 60(b) cover the field. Certainly, federal law would therefore govern most of the procedural features of a jurisdictional challenge in federal court. On the particular feature of burden and standard, federal law should govern because the strong federal interests in the sound workings of the federal courts demand a prima facie standard, for all the reasons that this Article catalogues.

Nevertheless, this *Erie* conclusion is no slam dunk. The Federal Rules are no longer to be read broadly for *Erie* purposes, as held in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 430-31 (1996). The *Erie* argument, in the absence of a Federal Rule, would involve state interests and outcome-determinative effects similar to those that resulted in confiding to state law the reach of personal jurisdiction on state-created claims, as held in *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 231 (2d Cir. 1963) (en banc), and the burden and standard of proof on the merits, as held in *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943). Thus, when a federal court is determining personal jurisdiction under state law, a decent argument exists in favor of applying state law to burden and standard. See, e.g., *Wood Mfg. Co., Inc. v. Schultz*, 613 F. Supp. 878, 882 (W.D. Ark. 1985).

⁵⁶ See *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977) ("Because there is no statutory method for resolving this issue, the mode of its determination is left to the trial court.").

⁵⁷ Indeed, there is nothing uniquely American about this problem. In a passing-off case to which the Brussels Regulation applied on personal jurisdiction, the German Supreme Court had to decide where the harmful event occurred. It observed: "It is not relevant to an assessment of jurisdiction whether the defendant actually behaved contrary to the rules of competition. It is sufficient that such conduct has been alleged and cannot be excluded from the outset." Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 24, 2005, docket number I ZR 101/02, at juris online/Rechtsprechung, translated in [2006] Int'l Litig. Proc. 125, 128, 2005 WL 3749705 (citation omitted).

⁵⁸ An analogy is the same-issue limitation on issue preclusion. See RESTATEMENT OF JUDGMENTS §§ 68, 70 (1942) (providing for preclusion on "questions of fact" and some "questions of law"). As to the dimensions of a particular issue for issue preclusion pur-

Where thus applicable, the prima facie standard on a jurisdictional fact entails truly a factual showing—that is, a probabilistic determination made on the basis of evidence.⁵⁹ The court must weigh the evidence such as it is, even though requiring less than a preponderance showing. Many courts express mechanical proof rules, such as accepting the plaintiff's allegations to be true in case of conflict.⁶⁰ But the court should resist the allure of such mechanical rules,⁶¹ unless

poses, the modern view is that the scope of an issue should be determined in light of the efficiency/fairness rationale of *res judicata*: whether a matter to be presented in a subsequent action constitutes the same issue as a matter presented in the initial action is a pragmatic question, turning on such factors as the degree of overlap between the factual evidence and legal argument advanced with respect to the matter in the initial action and that to be advanced with respect to the matter in the subsequent action. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982).

A similar approach would be possible for determining whether the same issue arises as to both jurisdiction and the merits. But the analogy is not perfect. The policies in this setting differ somewhat from the policies of *res judicata*. Thus, it seems slightly better to ask whether a finding of a jurisdictional fact would also go toward proving the merits, rather than whether the finding actually equates to some "issue" on the merits.

⁵⁹ *See* *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 676–78 (1st Cir. 1992) (discussing a variety of lower standards).

Consequently, on appeal the standard of review should be "clearly erroneous." *See* *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1075–76 (9th Cir. 2003), *dismissed on reh'g en banc*, 398 F.3d 1125 (9th Cir. 2005); *Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 746 (11th Cir. 2002); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 151 (2d Cir. 2001). Admittedly, a number of cases and commentators declare that appellate courts should review prima facie jurisdictional determinations under a *de novo* standard. *See, e.g., Boit*, 967 F.2d at 675; 4 WRIGHT & MILLER, *supra* note 12, § 1067.6, at 571 & n.18. But these authorities are conceiving of the prima facie standard as some sort of mechanical proof rule, such as a demurrer-like technique of accepting the plaintiff's allegations as true. If instead the prima facie standard is actually a factual one, then the clearly erroneous standard of review should apply. *See Boit*, 967 F.2d at 676, 678; 5B WRIGHT & MILLER, *supra* note 12, § 1351, at 314–16. Similarly, the tougher appellate scrutiny that applies to decisions on motions for summary judgment or judgment as a matter of law is not an argument against applying the deferential standard of review to decisions of jurisdictional fact. Even though the trial court employs on those motions a standard of proof that could be analogized to prima facie proof, its decisions receive the close appellate scrutiny given to a question of law because they represent a shortcut to dispose of the case on the merits. *See* 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* §§ 3.09, 5.02 (3d ed. 1999) (describing the law label here as an artifice).

Contrariwise, if the trial court on the jurisdictional decision uses a prima facie standard in determining the applicable law rather than fact, *see infra* text accompanying notes 116–30, then for the usual institutional reasons the standard of review should revert to nondeferential. *See* 1 CHILDRESS & DAVIS, *supra*, § 2.21(G). On distinguishing law from fact in this context, *see generally Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (drawing a law/fact line for purposes of standard of review, and saying discriminatory intent under civil rights statute is a question of fact entitled to deferential review); 1 CHILDRESS & DAVIS, *supra*, ch. 2 (discussing the law/fact distinction for appellate review); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991) (same).

⁶⁰ *See* 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][b], at 12 n.22; 4 WRIGHT & MILLER, *supra* note 12, § 1067.6, at 563–67.

⁶¹ *See, e.g., Val Leasing, Inc. v. Hutson*, 674 F. Supp. 53, 55 & n.1 (D. Mass. 1987).

they act merely as heuristics in helping to implement a factual standard.⁶²

Once embraced, the *prima facie* standard causes significant oddities and hesitations to melt away. These benefits flow from the simplified and streamlined threshold procedure, which can decide jurisdiction without dragging in the case's merits completely. This procedure avoids the waste and other impracticalities of a full-dress preliminary hearing that would really be a trial, as well as the unfairness of a defendant's obtaining only a jurisdictional dismissal for what was really a victory on the merits.

First, consider the *judge/jury problem*. In a common-law-type action, there will often be a trial by jury.⁶³ In those cases, the jury will decide the issues that are contestable and factual, while the judge determines the law.⁶⁴ Jurisdictional facts are traditionally classified as questions of law for jury-trial purposes.⁶⁵ Nevertheless, the authorities equivocate when jurisdictional facts overlap the merits, saying that maybe a jury has to pass on jurisdiction because a jury right exists on the same facts involved in the merits.⁶⁶ This equivocation is the product of the confusion that results from failing to take account of the difference in the standards of proof on the jurisdictional and merits

⁶² See, e.g., *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982) ("Conflicts between the affidavits submitted on the question of personal jurisdiction are thus resolved in favor of the plaintiff. When, as in this case, personal jurisdiction is predicated on the commission of a tort within the state, of course the jurisdictional question involves some of the same issues as the merits of the case, and the plaintiff must make a *prima facie* case on the merits to withstand a motion to dismiss under rule 12(b)(2).") (citations omitted), *reh'g denied with opinion*, 712 F.2d 1002 (5th Cir. 1983).

⁶³ See CLERMONT, *supra* note 4, § 2.4(B).

⁶⁴ See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (drawing a law/fact line for purposes of jury right by a historical and functional test); Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1125 (2003) (looking to history to argue that under the Seventh Amendment "questions requiring inductive inferences about the transactions or occurrences in dispute are 'fact' questions, which must be decided by the jury in appropriate cases"); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 754 (1993) (arguing that by text, precedent, and policy, the Seventh Amendment's role in this context is to preserve the "essence" or "substance" of the jury).

⁶⁵ See Note, *Trial by Jury of Preliminary Jurisdictional Facts in Federal Courts*, 48 IOWA L. REV. 471, 479, 481 (1963) (noting that jurisdiction is an issue collateral to the merits, and thus that no jury right exists); Steven Kessler, Note, *The Right to a Jury Trial for Jurisdictional Issues*, 6 CARDOZO L. REV. 149, 149 (1984) ("[T]he constitutional right to trial by jury should be confined to the merits of the case, and should not extend to preliminary jurisdictional issues."); cf. Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771 (2003) ("[T]he decision to label an issue 'law' or 'fact' is a functional one based on who should decide it under what standard, and is not based on the nature of the issue.").

⁶⁶ See, e.g., *Friedman v. Wilson Freight Forwarding Co.*, 181 F. Supp. 327, 329 (W.D. Pa. 1960) (stating that there is jury right "where the jurisdictional question of joint venture is closely tied to the merits"); Note, *supra* note 65, at 480-81, 489; Kessler, *supra* note 65, at 165-66.

issues. Whether a fact exists to a prima facie degree is a different issue from whether the fact exists to a preponderance. So, even when there is a jurisdictional challenge that involves facts also involved in the merits of the claim, the judge should be able to decide the jurisdictional challenge on his own and at the outset of the action. That is, the judge can decide jurisdiction without the intervention of a jury—and without fear of stepping on any jury right.⁶⁷

Most notably, the *res judicata* and *law-of-the-case* problem disappears under a regime of prima facie proof. If a court were to find a fact by a preponderance in deciding jurisdiction, and that fact is common to the merits, there could be unexpected and undesirable preclusive effects on those merits.⁶⁸ Lowering the standard of proof is the ready cure. An affirmative finding on contested jurisdictional facts by a prima facie standard will not affect the merits, because facts found by a lower standard of proof will not preclude issues governed by a higher standard of proof;⁶⁹ but a finding of jurisdiction will preclude later relief from judgment for lack of jurisdiction, by the ordinary operation of the jurisdiction to determine jurisdiction doctrine.⁷⁰ Alternatively, under existing law, a finding of no jurisdiction does not produce a valid judgment and so should not be binding in another action, except to defeat jurisdiction in any attempt to sue again in a court where the same jurisdictional issue arises.⁷¹ The resulting basic rule—that a jurisdictional finding will not carry over to the merits—derives from breaking the identity between jurisdictional facts and those on the merits, which was the source of all the oddities and hesitations in this corner of the law.⁷²

Finally, consider the *relief-from-judgment* problem. Under a prima facie regime, a default judgment will not leave the merits open to full litigation, under the guise of a jurisdictional inquiry, upon a collateral attack or other request for relief from judgment.⁷³ Once again, differing standards of proof break the identity of jurisdiction and merits to avoid the danger. Consequently, if the defendant were later to launch a collateral attack, all that the plaintiff would have to establish on the

⁶⁷ See *Val Leasing, Inc. v. Hutson*, 674 F. Supp. 53, 55 (D. Mass. 1987); Homburger, *supra* note 19, at 85.

⁶⁸ See *supra* note 9.

⁶⁹ See RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982).

⁷⁰ See *id.* § 10(2).

⁷¹ See CLERMONT, *supra* note 4, § 4.4(B)(3); Michael J. Edney, Comment, *Preclusive Abstention: Issue Preclusion and Jurisdictional Dismissals After Ruhrgas*, 68 U. CHI. L. REV. 193, 216–20 (2001) (addressing the preclusive effect of a federal court's dismissal for lack of jurisdiction).

⁷² The desirability of this basic rule receives confirmation from the specific Illinois and Texas provisions discussed *supra* note 27.

⁷³ See *supra* note 11.

overlapping jurisdictional facts is a *prima facie* showing.⁷⁴ From the example of *Shirley v. Jim*, if Jim were to introduce evidence negating intercourse, Shirley could defeat this later attack by merely showing that her allegation was plausible.

3. *Noneffect of Procedural Setting on Standard*

The prescribed approach to proving jurisdictional fact is straightforward: the proponent of personal jurisdiction must make the usual showing of "more likely than not," except that when the fact overlaps the merits of the claim, the proponent need provide only *prima facie* proof to establish jurisdiction. This statement requires only one further qualification,⁷⁵ and the procedural setting is not it.

As described above,⁷⁶ the jurisdictional issue may arise in a variety of procedural settings. Courts have sometimes yielded to the temptation of varying the standard of proof in response to the particular procedural setting. That is, they may boost the standard to a higher required probability if the parties have had jurisdictional discovery,⁷⁷ and may boost it even higher if the court has held a pretrial evidentiary hearing on jurisdiction.⁷⁸ Most prominently, judges often say that they would raise the *prima facie* standard all the way to preponderance if they were to postpone the decision on personal jurisdiction until trial.⁷⁹ Or, more strangely, they sometimes adjust the standard

⁷⁴ See *Stauffacher v. Bennett*, 969 F.2d 455, 459-60 (7th Cir. 1992) (dictum) (Posner, J.).

⁷⁵ See *infra* Part I.B.4.

⁷⁶ See *supra* Part I.B.1.

⁷⁷ See, e.g., *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990); *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990); *In re Baan Co. Sec. Litig.*, 245 F. Supp. 2d 117, 123-25 (D.D.C. 2003); *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 70-71 (D.D.C. 1998), *motion ruled on*, 90 F. Supp. 2d 15 (D.D.C. 2000).

⁷⁸ See, e.g., *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 625 (5th Cir. 1999); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999); *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *Myers v. Johns Manville Sales Corp.*, 600 F. Supp. 977, 980 (D. Nev. 1984) ("The plaintiff's burden varies in difficulty according to the limits imposed by the court on the pretrial proceedings.").

⁷⁹ See, e.g., *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675-78 (1st Cir. 1992) (discussing lower standards for pretrial motions, but assuming they would not apply at trial); *Dorf v. Complastik Corp.*, 735 A.2d 984, 988-90 (Me. 1999). These two cases concern jurisdictional facts that overlap the merits, showing judges' propensity to adjust the *prima facie* standard in response to the procedural setting. But a similar judicial willingness to apply a lower standard on a pretrial decision prevails even when the appropriate standard of proof on a non-overlapping jurisdictional fact is unquestionably the preponderance standard. See, e.g., *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831-32 (5th Cir. 1986), *modified on other grounds*, 836 F.2d 850 (5th Cir. 1988). Thus, many cases seem to say that a *prima facie* showing suffices to withstand any pretrial motion to dismiss for jurisdiction, even though the preponderance standard applies to the jurisdictional fact otherwise. See 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][b], at 9 n.17, 12 & n.23; 2 MOORE ET AL., *supra* note 47, § 12.31[5]. As I soon will explain, however, lowering the standard for early determinations is nonsensical, because the lowered standard would force defendants who even-

of proof to reflect some unrelated procedural option, as when they require the plaintiff to establish jurisdiction more clearly if the plaintiff seeks a preliminary injunction.⁸⁰

Nonetheless, courts should resist such temptation. They should not vary the jurisdictional standard of proof with differences in the procedural setting, even assuming that they are really capable of accurately adjusting and readjusting the standard of proof by fine degree.⁸¹ Instead of changing the standard of proof, courts should afford the fuller procedures, allowing discovery and an evidentiary hearing if necessary to apply properly the consistently applicable standard of proof.⁸² Alternatively, the court may choose to defer decision under that same standard until such time as those fuller procedures become efficient to employ, perhaps at trial on the merits,⁸³ although courts should be somewhat reluctant to postpone because delay can

tually prevail on the merits to defend in a forum where by law they supposedly need not defend. Furthermore, it risks imposing on these defendants a jurisdictional dismissal after they successfully defend on the merits unless they can then consent to jurisdiction. So, how does one account for this common but nonsensical judicial pronouncement? Most likely, such judicial statements in favor of an early lowered standard are merely loose and confused talk to which the court has no intention of giving tangible effect. Indeed, apparently no actual case exists in which the court upheld jurisdiction by a lowered standard on pretrial motion and then properly found no jurisdiction at trial under the higher standard, as opposed to cases that straightforwardly postponed the jurisdictional issue until determination at trial. See 2 CASAD & RICHMAN, *supra* note 3, § 6-1[3][b], at 14 & n.26. In reality, then, this use of the prima facie standard for only pretrial purposes may serve merely as an inarticulate rule of thumb for determining whether to postpone the jurisdictional determination until trial. That is, if the plaintiff can make a plausible jurisdictional showing at the threshold, the judge will invoke discretion to postpone determination until later; but whenever the judge actually decides jurisdiction, the standard of proof on a non-overlapping jurisdictional fact will be preponderance of the evidence.

⁸⁰ See, e.g., *Visual Sci., Inc. v. Integrated Commc'ns Inc.*, 660 F.2d 56, 59 (2d Cir. 1981) ("A prima facie showing of jurisdiction will not suffice, however, where a plaintiff seeks preliminary injunctive relief. A court must have in personam jurisdiction over a party before it can validly enter even an interlocutory injunction against him. . . . Where a challenge to jurisdiction is interposed on an application for a preliminary injunction '[t]he plaintiff is required to adequately establish that there is at least a reasonable probability of ultimate success upon the question of jurisdiction when the action is tried on the merits.' *Industrial Electronics Corp. v. Cline*, 330 F.2d 480, 482 (3d Cir. 1964)."); *Am. Para Prof'l Sys., Inc. v. LabOne, Inc.*, 175 F. Supp. 2d 450, 454 (E.D.N.Y. 2001) ("This burden varies, however, depending upon the procedural posture of the case."). The explanation lies in the premise of these cases, which was that the standard would rise from prima facie at pretrial to preponderance at trial, before final relief could be given. See *supra* note 79.

⁸¹ The quantum-step insight, discussed later, further argues against calling for fine adjustments in the standard of proof. See *infra* text accompanying notes 112-113.

⁸² See *Gen. Contracting & Trading Co. v. Interpole, Inc.*, 899 F.2d 109, 114-16 (1st Cir. 1990); *Priess v. Fisherfolk*, 535 F. Supp. 1271, 1275 (S.D. Ohio 1982) ("If the memoranda, affidavits and discovery materials present disputed issues of credibility and fact concerning personal jurisdiction, the Court should deny the motion to dismiss and hold an evidentiary hearing on the controverted issues."); *Peterson v. Spartan Indus., Inc.*, 310 N.E.2d 513 (N.Y. 1974) (holding that a plaintiff need not establish prima facie jurisdiction under the long-arm statute before being given an opportunity for discovery).

⁸³ See *supra* text accompanying note 49.

unfairly and awkwardly force the defendant to litigate in a place that turns out to lack personal jurisdiction.

Keeping the standard of proof for jurisdiction constant, regardless of the procedural setting, works to dissipate potential problems. For example, the contrary practice of raising the standard of proof at trial would risk imposing on defendants a jurisdictional dismissal after the successful defense on the merits, unless the defendants can then consent to jurisdiction and thereby sidestep the payback for their success. For another example, that contrary practice would create problems in applying the *Steel Co.* rule, which says that a court must decide jurisdiction-like issues first.⁸⁴ To illustrate, a court might find jurisdiction to exist *prima facie* on a pretrial motion, then go on to rule on other motions and hold a trial, and finally decide that jurisdiction does not exist by a preponderance. This way of opening an affirmative jurisdictional determination to reconsideration at trial under a higher standard of proof would undermine the policies behind *Steel Co.*'s first-things-first rule, because by then a court without jurisdiction will have taken many steps.

Also worrisome would be any judicial inclination to vary the standard of proof with the defendant's chosen time for challenging jurisdiction (i.e., special appearance at the outset or later relief from judgment, whether by direct or collateral attack). On special appearance, on a pretty light showing the court might incline to say that the plaintiff has made a sufficient showing to proceed to the merits, when the defendant will have an opportunity to continue trying to defeat the plaintiff's claim. On collateral attack, the court might instead incline to indulge the defaulting defendant when deciding the jurisdictional contest, raising the standard for the plaintiff's proof and so enabling the defendant to maintain that the plaintiff had wrongly sued this defendant in that first forum; there is a certain appeal to letting the defendant demonstrate, say, that a hallucinating plaintiff fabricated a story to sue the upright defendant in an abusive forum. Nevertheless, the law shifts the burden of proof to the defendant on subsequent attack, so it seems to reject any urge to indulge a collaterally attacking defendant.⁸⁵ Moreover, a higher standard for the plaintiff on collateral attack by the defendant would open the door a bit to collateral attack after special-appearance-then-default, because the de-

⁸⁴ See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). The rule certainly covers personal jurisdiction as well as subject-matter jurisdiction, see *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999), but may not stretch so far as to cover forum non conveniens, see *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 361–64 (3d Cir. 2006).

⁸⁵ See *supra* text accompanying note 53.

fendant could argue that the earlier finding under the lower standard of proof is not preclusive.⁸⁶

In particular, the standard of proof for jurisdictional facts that overlap the merits should not, at some procedural stage, jump from *prima facie* to preponderance. It should not be that a plaintiff can get to trial by a *prima facie* showing of jurisdiction, but once at trial must show both jurisdiction and liability by a preponderance. As I have explained, the delayed jump in the jurisdictional standard of proof would have forced winning defendants to defend on the merits where by law it turns out they did not have a true obligation to defend, and it would also risk imposing on those defendants a jurisdictional dismissal after what would have been a successful defense on the merits unless they can then consent to jurisdiction.⁸⁷ Moreover, saying that preponderance is the ultimately applicable standard for jurisdiction reintroduces variations of the judge/jury problem, the *res judicata* and law-of-the-case difficulty, and unnecessary exposure of the resulting judgment to subsequent attack seeking relief from judgment—in short, all the undesirable consequences that prompted the adoption of a *prima facie* standard in the first place.

An especially blatant problem with a varying standard of proof came to light in the intriguing case of *Peterson v. Highland Music, Inc.*⁸⁸ In that case, the Kingsmen sued to reacquire the rights to their hit song, “Louie, Louie.”⁸⁹ The defendants moved to dismiss for lack of personal jurisdiction, arguing that they lacked minimum contacts with California.⁹⁰ The plaintiffs showed a series of licensing agreements that the defendants had entered into with California companies, out of which the cause of action arose, “as it is the failure of the defendants to provide royalties on these and other licensing agreements that serves as the basis for plaintiffs’ suit” laid “in a forum where they took actions that allegedly constituted a breach of the contract at issue.”⁹¹ The district court found this showing to satisfy the *prima facie* standard.⁹² The case proceeded through pretrial and trial, with the plaintiffs winning judgment.⁹³ The defendants did not further pursue the jurisdictional point until appeal, when they urged that the standard of

⁸⁶ See *supra* text accompanying note 69.

⁸⁷ See *supra* text accompanying note 10.

⁸⁸ 140 F.3d 1313 (9th Cir. 1998) (William Fletcher, J.). Professor Tobias Wolff brought this case to my attention.

⁸⁹ See *id.* at 1316.

⁹⁰ See *id.* at 1317.

⁹¹ *Id.* at 1320.

⁹² See *id.* at 1317.

⁹³ See *id.*

proof for personal jurisdiction should be preponderance and that the existing trial-court record must contain that showing.⁹⁴

The Ninth Circuit, in affirming, rejected the defendants' argument for the higher standard of proof.⁹⁵ Common sense demanded this result. But the court had to struggle doctrinally to reach that result, because it began with the premise that the standard would indeed have been a preponderance if and when the defendants had urged again at trial the lack of personal jurisdiction.⁹⁶ It then had to rationalize, in this case, dropping the standard back down to *prima facie* on appeal:

In this case, none of the parties developed a record on the issue of personal jurisdiction beyond the few submissions each made in litigating the defendants' motion to dismiss. From the plaintiffs' perspective, there must have seemed little reason to do so: Plaintiffs prevailed on the personal jurisdiction question on pre-trial motion, and defendants did not contest the issue any further. Defendants cannot now capitalize upon the plaintiffs' early victory. Rather, defendants may seek appellate review only of the issue that they actually contested below: whether or not plaintiffs made out a *prima facie* case for personal jurisdiction, and whether the district court was correct in denying the motion to dismiss.⁹⁷

These mental gymnastics were unnecessary. The correct result would have followed so much more simply if the Ninth Circuit had recognized that a *prima facie* showing suffices at pretrial, during trial, and on appeal for jurisdictional facts that overlap the merits. More generally, the appropriate standard of proof—be it preponderance for most jurisdictional issues or some lower standard when the jurisdictional facts overlap the merits—should consistently apply before, during, and after trial. Among many advantages, this approach thus complies with the law of simplicity, or of parsimony and elegance, thus escaping the slash of Occam's Razor.

4. *Effect of Factual Hierarchy on Standard*

Yet, as Einstein supposedly put it, "Everything should be made as simple as possible, but not simpler."⁹⁸ And another moment's thought will suggest that the precise meaning of the malleable term of

⁹⁴ See *id.*

⁹⁵ See *id.* at 1319–20.

⁹⁶ See *id.* at 1319.

⁹⁷ *Id.*

⁹⁸ E.g., Quotable Quotes, READER'S DIG., July 1977, at 42; *Collected Quotes from Albert Einstein*, <http://rescomp.stanford.edu/~chesbire/EinsteinQuotes.html> (last visited Mar. 16, 2006). Although many sources repeat this quote or a variant, neither I nor others have been able to locate it in Einstein's writings or speeches. See THE NEW QUOTABLE EINSTEIN 290 (Alice Calaprice ed., 2005) ("Everyone seems to know it, yet no one can find its original source.").

prima facie proof should turn on which particular fact the defendant is contesting.

On the one hand, think of mistaken identity for a defendant who defaulted because he had no connection whatsoever with a totally misled plaintiff. Upon enforcement of the default judgment at the defendant's home, the system would intuitively let him maintain that the in-state actor had not been him, even if the plaintiff could make a plausible showing of same name and likeness.⁹⁹ Foreclosing collateral attack would be unfair. Indeed, that result would create a worldwide service provision. No defendant could risk defaulting, because too much would be at stake under conditions too uncertain.

On the other hand, the system would incline to treat location of the jurisdictional act differently. It would lean away from allowing the defendant to litigate fully that locational fact.¹⁰⁰ If the plaintiff could show a prima facie likelihood that the act took place on the right side of the state border, the defendant should appear in the first forum to litigate. If the defendant chooses to default, then on collateral attack the defendant can maintain as to location only that the plaintiff cannot make a prima facie showing. This resistance to relief explains why, when courts or commentators want to justify the existence of collateral attack, they never speak of location but instead always use examples closer to the identity end of the spectrum.¹⁰¹

Thus, in any specific case, there appears to be a spectrum, or rather a hierarchy, of jurisdictional facts. For example, thinking back to the *Shirley v. Jim* case, the jurisdictional facts include:

- identity (nexus to defendant);¹⁰²
- intercourse (act);¹⁰³

⁹⁹ See *Jackson v. FIE Corp.*, 302 F.3d 515, 524 (5th Cir. 2002) (deciding relief was available, while observing: "To prove that the judgment was void for lack of personal jurisdiction, Fratelli Tanfoglio raises an assertedly meritorious defense (identity of the pistol's manufacturer) that the district court's default judgment on the merits had flatly rejected. Because the identity of the pistol's manufacturer has ramifications for both jurisdiction and the merits, the 'foundational principle' embodied in Rule 60(b)(4) collides head-on with a well-established rule of claim preclusion.").

¹⁰⁰ See *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982) (noting of the plaintiff on a motion to dismiss that "he must also make a prima facie showing that the tort occurred within the state"), *reh'g denied with opinion*, 712 F.2d 1002 (5th Cir. 1983); *Dustin v. Cruise Craft, Inc.*, 487 F. Supp. 67, 69 (D.N.H. 1980) (upholding jurisdiction when "one might justifiably conclude that the boat as likely capsized in New Hampshire territorial waters as in Maine territorial waters").

¹⁰¹ See, e.g., *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 64 F. Supp. 2d 839, 846-47 (S.D. Ind. 1999) (using an example of a defendant who can show she was never a partner of a person who signed the contract and therefore cannot be subjected to jurisdiction by it), *rev'd on other grounds*, 212 F.3d 1031 (7th Cir. 2000).

¹⁰² See *supra* note 99.

¹⁰³ See *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988) (reversing pretrial dismissal for lack of jurisdiction, where the issue was the defendant's in-state acts, and observing: "In the context of a motion to dismiss for lack of personal jurisdiction in which no eviden-

- location (nexus to sovereign);¹⁰⁴
- impregnation (result);¹⁰⁵ and
- failure to support (legal liability).¹⁰⁶

The legal system would apply a high standard of proof to identity for jurisdictional purposes, requiring the plaintiff to achieve at least equipoise on that issue. Meanwhile, it would require the plaintiff merely to *allege* failure to support, rather than to *prove* it at all for jurisdictional purposes, leaving the parties to litigate legal liability on the merits. It would then apply the prima facie standard of proof to the facts in between, but prima facie would imply a different rigor for the different facts: the system might require the "slightest possibility" for the result of impregnation, meaning little more than good-faith allegation; "reasonable possibility" for the location of the act, implying that reasonable fact finders could differ; and the higher showing of a "substantial possibility" for the fact of intercourse.

Perhaps this gradated meaning of prima facie seems overly subtle. But such subtle refinement becomes necessary for clear thinking whenever a lower standard of proof prevails. Again, for example, if Shirley must show impregnation merely as the slightest possibility, then even Jim's DNA evidence refuting impregnation would not defeat jurisdiction in the original action, but would go solely to the merits; Jim would win the case, but the DNA fight would not play out on a jurisdiction motion. The irrelevance of DNA to jurisdiction would continue to prevail even if Jim defaulted and then sought relief from judgment for lack of jurisdiction; Jim would then have to produce proof that Shirley could not show the slightest possibility of his having impregnated her or, in other words, produce proof that banishes all doubt,¹⁰⁷ which really is an impossible standard to meet in this uncer-

tiary hearing is held, the plaintiff bears the burden of establishing a prima facie case of jurisdiction over the movant, non-resident defendant. A prima facie case is established if the plaintiff presents sufficient evidence to defeat a motion for a directed verdict.") (citations omitted).

¹⁰⁴ See *supra* note 100.

¹⁰⁵ See *Mountain States Sports, Inc. v. Sharman*, 353 F. Supp. 613, 617 (D. Utah 1972) ("However, the court interprets the Utah law to require only a good faith allegation of injury in order to vest the court with power to proceed to trial.").

¹⁰⁶ See *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491 (5th Cir. 1974) (considering pretrial dismissal for lack of jurisdiction, and agreeing with appellant that "the task required only a prima facie showing of the facts on which jurisdiction was predicated, not a prima facie demonstration of the existence of a cause of action. . . . In order to make a prima facie showing of the facts on which jurisdiction was predicated under the contract portion of the statute, appellant did not have to show prima facie evidence of a breach of contract. Rather, appellant had to present prima facie evidence that (1) a contract to be performed in whole or in part within Texas existed between itself and appellees and (2) the present suit arose out of that contractual arrangement.").

¹⁰⁷ See *supra* note 53.

tain world¹⁰⁸ and therefore results in the existence of jurisdiction.¹⁰⁹ For a contrary example, equally strong evidence on the issue of intercourse would defeat jurisdiction, on special appearance or on collateral attack. Shirley must show a substantial possibility of intercourse having occurred. If Jim can produce contrary evidence of strength comparable to DNA evidence, then he could defeat jurisdiction, whenever he properly challenged it.

Moreover, this gradation of the standard of proof does not spring only from this sort of intuition or logic. Fairness and other jurisdictional policies additionally argue that the system should be quite confident of the defendant's identity and at least somewhat confident that he committed the act of intercourse, but it should be less concerned about litigating, as a matter of jurisdiction, the location and results of that act. Indeed, the wording of specific state long-arm statutes (e.g., "the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse"¹¹⁰) suggests, or even imposes, such a hierarchy of facts as it downplays the needed showing of conception.¹¹¹

Consequently, as much as any theoretician would dislike the messiness of a hierarchy of facts, courts are implicitly going to invoke one when they apply the *prima facie* standard in real cases. And the law would be wise to concede, by recognizing the hierarchy explicitly and then trying to control it.

In doing so, the temptation could arise for legislators or courts to take advantage of the malleability of the *prima facie* term by attempting to adjust the standard to an infinite fineness in response to the contested fact's importance. My own view, based on cognitive science, is that the boundedly rational human mind cannot reliably make such fine adjustments, and so the law should not call upon it to do so.¹¹² Just as the traditional standards of proof above equipoise have coalesced around (1) preponderance of the evidence, (2) clear and convincing evidence, and (3) beyond a reasonable doubt, the standards of proof below equipoise should follow a quantum-step approach that

¹⁰⁸ For a discussion of possible Cartesian arguments regarding uncertainty, see Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 871-74 (1992).

¹⁰⁹ But with his DNA evidence, which is increasingly common, Jim might get relief from judgment on other grounds like fraud, or modify the judgment to lift future obligations for support. See generally Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004) (discussing the success of disproving paternity with DNA testing).

¹¹⁰ N.Y. FAM. CT. ACT § 580-201(6) (McKinney 2005).

¹¹¹ See *supra* note 5.

¹¹² See Clermont, *Procedure's Magical Number Three*, *supra* note 1, at 1152 n.144 (discussing the inappropriateness of a sliding scale for jurisdictional facts).

recognizes only the gradations of (1) slightest possibility, (2) reasonable possibility, and (3) substantial possibility.¹¹³

The task for the law, then, is to assign an appropriate standard of proof to each contested jurisdictional element, one that reflects the direct costs of applying the standard and the element's importance in terms of the expected value of resultant errors, giving due weight to the differential between the policy against failing to provide a forum to the plaintiff (Type II error) and the policy against failing to limit the burden on the defendant (Type I error).¹¹⁴ The aim is to minimize the sum of the costs, but the trick is to specify properly the sources and magnitudes of all the various costs. Earlier in this Article, it was the costs of applying a preponderance standard to overlapping jurisdictional issues—direct costs such as holding a full-dress hearing, as well as the consequences as to jury right, preclusion, and subsequent attack—that drove the standard down to *prima facie* proof.¹¹⁵ Now, it is the varying differential between Type I and Type II error costs that causes further adjustment in the meaning of *prima facie* for different jurisdictional elements, so that courts will demand a stronger jurisdictional showing on the defendant's identity than on the act's location. At any rate, this task of assigning the appropriate standard of proof to each element is a typical and traditional one for the law, here made easier by realizing that the choice is among only the quantum steps on the lower half of the probability scale.

II

BREADTH OF THE STANDARD'S APPLICATION

The described approach to proving jurisdiction turns out to be as broadly applicable as it is simple to state. Although courts give it explicit recognition most often in connection with personal-jurisdictional fact, courts implicitly apply it much more broadly.

A. Extending Beyond Fact to Law

The first step outward would be from fact to law, a step all too obviously necessitated by long-arm statutes that refer to acts such as "commission of a tortious act within this State."¹¹⁶ So, what is the required showing on the legal question of whether the alleged facts constitute a tort?

¹¹³ Cf. *id.* at 1122–25 (developing these three gradations in connection with harmless-error and police-search law).

¹¹⁴ See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 366–67 (2001); Clermont, *Procedure's Magical Number Three*, *supra* note 1, at 1118–21; Clermont, *Standards of Proof in Japan*, *supra* note 1, at 267–72.

¹¹⁵ See *supra* text accompanying notes 8–11.

¹¹⁶ 735 ILL. COMP. STAT. § 5/2-209(a)(2) (2005).

This seemingly straightforward inquiry raises the profound question of how the notion of standard of proof applies to issues of law. The profundity of this question could counsel its avoidance when possible. Thus, the wise course may be for jurisdictional statutes to avoid the use of terms, like "tortious," that connote a legal outcome.¹¹⁷ Similarly, when left free to shape doctrine, courts might try to avoid or construe away any legal overlap between jurisdiction and the merits, or read the jurisdictional statute to require the plaintiff merely to allege something like "the facts *might* constitute a cause of action."¹¹⁸ If, however, the court finds such avoidance to be statutorily foreclosed, or finds drawing a line between law and fact to be especially difficult, the court has to face the profound but neglected question of the standard of proof for law.

Happily, that question turns out to have a relatively straightforward answer. Simply put, for the purposes of required showing, no momentous distinction lies between fact and law; they are epistemological equivalents.¹¹⁹ "If one makes any propositional claims about what the law *is*, regardless of what one has in mind by 'law,' one is making claims of fact."¹²⁰

To establish any proposition, whether of fact or law and in any context, we look to evidence. That look must entail three steps: we will apply rules of admissibility of evidence, we will employ analytic methods for measuring and combining the significance or weight of that evidence, and we will require the combined evidence's weight to exceed some standard before declaring the proposition proved.¹²¹ The concern here is the last of the necessary steps—applying the stan-

¹¹⁷ See *Prod. Promotions, Inc. v. Cousteau*, 495 F.2d 483, 491 (5th Cir. 1974) (distinguishing long-arm statute for contract actions, which usually does not read as if it requires proof of the cause of action); 1 CASAD & RICHMAN, *supra* note 3, § 4-2[2][a][iii]; cf. Homburger, *supra* note 19, at 86–87 (noting that this whole standard of proof problem can generally be avoided by ensuring that jurisdictional facts do not overlap the merits).

¹¹⁸ See *Baldwin v. Household Int'l, Inc.*, 36 S.W.3d 273, 277 (Tex. App. 2001) ("When reaching a decision to exercise or decline jurisdiction based on the defendant's alleged commission of a tort, the trial court should rely only upon the necessary jurisdictional facts and should not reach the merits of the case. In other words, ultimate liability in tort is not a jurisdictional fact, and the merits of the cause are not at issue. When the plaintiff alleges an action in tort that arose out of an act committed in Texas, the necessary proof is only that the purposeful act was committed in this State. . . . The act or omission within the state is a sufficient basis for the exercise of jurisdiction to determine whether or not the act or omission gives rise to liability in tort.") (citations omitted).

¹¹⁹ See *Allen & Pardo*, *supra* note 65, at 1770 ("Thus, the quest to find 'the' essential difference between the two that can control subsequent classifications of questions as legal or factual is doomed from the start, as there is no essential difference.").

¹²⁰ *Lawson*, *supra* note 108, at 865 ("[A] proposition by definition is the sort of statement that can be either true or false."). "Whatever one's metaphysical theory of law may be, any positive propositions derived from that theory are, from an epistemological standpoint, claims of fact." *Id.* at 863.

¹²¹ See *id.* at 861–77.

dard of proof. "The need for standards of proof and the effect of standards of proof on interpretative outcomes are independent of the admissibility and significance rules of one's theory of interpretation."¹²² One simply cannot talk about accepting a proposition without, at least implicitly, invoking a standard of proof. The necessity of a standard of proof is therefore just as real for law as for fact.

Strangely, however, we tend not to speak of standards of proof for law. "By and large, the law says nothing to initial decisionmakers who wonder what standard of proof they should apply to propositions of law. Fact finders are always given a standard; law finders are generally on their own."¹²³ They just have to find the law (or make conclusions of law)—doing so by a process that goes largely unexamined, apparently because the process comprises a usually internal and fairly intuitive or automatized chain of cognition. Nevertheless, even if unexamined, standards of proof for law are in play.¹²⁴ Moreover, examining them illuminates the matter of standards of proof in general.

The standard of proof for law normally is more-likely-than-not.¹²⁵ But this standard of proof does not apply to the whole question of what the applicable law is, because an approach requiring the entire law in dispute to be more-likely-than-not would lead to disastrous gaps where no law exists, as when multiple plausible interpretations compete.¹²⁶ Instead, the key insight, unperceived in the previous literature, is that this standard of proof applies at, and only at, each binary crossroad the judge encounters in determining what the law is. That is, if a judge adopts the more likely interpretation at each of a series of

¹²² *Id.* at 875.

¹²³ *Id.* at 888.

¹²⁴ Burdens of proof for law are consequently in play too, even if we tend not to speak of them either. *See id.* at 868, 895. Often, it is obvious which party is pushing an issue of law and so bears the burden of persuasion. Yet, burdens on law can shift under the influence of canons of interpretation. *See id.* at 877. The judge thereby will come at any interpretative problem from one direction while going toward a particular view, and so should put the risk of nonpersuasion on the party urging that view.

¹²⁵ The focus here is initial decision making, not appellate review. *See id.* at 883–88. Moreover, the focus is law determining, not law making. *See* Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 Nw. U. L. REV. 916, 935–38 (1992).

In initial law determining, standards of proof should be generally applicable for whole categories of cases. In an ideal world, even for law determining, one could argue that the standard of proof should vary case by case in response to the expected value of each possible legal interpretation. *See id.* at 926–27; *cf.* Dominique Demougin & Claude Fluet, *Deterrence Versus Judicial Error: A Comparative View of Standards of Proof*, 161 J. INSTITUTIONAL & THEORETICAL ECON. 193 (2005) (making a similar point with respect to fact finding, and showing by sophisticated analysis that a variable standard of proof, set on a case-by-case basis by the ideal judge, could serve accuracy by offsetting the unavailability or inadmissibility of evidence in the particular case). But the path of the law in the real world has not been toward variable standards of proof. *See* Friedman, *supra*, at 936–37.

¹²⁶ *See* Larry Alexander, *Proving the Law: Not Proven*, 86 Nw. U. L. REV. 905, 905–11 (1992). *But cf.* Lawson, *supra* note 108, at 894–904 (embracing the disastrous result).

properly ordered yes-or-no steps, the judge will reach an overall interpretation of the law at issue that is more likely correct than any competing interpretation.¹²⁷ This step-by-step more-likely-than-not standard, then, will produce the most acceptable of the alternative interpretations, which is, as most observers agree, what the system should and does desire to reach.¹²⁸

Sometimes, the standard of proof differs from the normal and neutral one of more-likely-than-not, in order to avoid the special costs of error in one particular direction. The most prominent example is where a clear-statement rule, such as the rule of lenity in criminal law, raises the bar for finding a change in the law.¹²⁹ When a clear-statement rule prevails, the evidence must unmistakably compel the interpretation being urged. For one specific example, finding a statutory exception to full faith and credit requires an “affirmative showing” of a “clear and manifest” congressional purpose.¹³⁰

Getting back to the subject of jurisdictional issues of law that overlap the merits, the standard of proof should lower in order to minimize costs. Admittedly, some cases do seem weakly to suggest that a court must determine all jurisdictional issues of law in the normally full fashion.¹³¹ This position must be wrong. The court should avoid treating an attack on personal jurisdiction like a demurrer.¹³²

¹²⁷ In fact finding, analogously, the standard of proof applies in theory to each element of a claim or defense, not to the whole story. See RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 1272–74 (8th ed. 2003) (discussing the problem of conjunction); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 559–69 (2004) (discussing whether standards of proof are in reality applied atomistically or holistically). And likewise, this step-by-step approach will yield the most plausible story, not necessarily a story that is more probable than not. See Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 MICH. ST. L. REV. 893, 936–43.

¹²⁸ See, e.g., Alexander, *supra* note 126, at 906, 911. But cf. Lawson, *supra* note 108, at 890–94 (resisting the best-available-alternative approach, which he concedes is generally accepted).

¹²⁹ See Lawson, *supra* note 108, at 888–90. Presumptions used in legal interpretation, such as the presumption of territoriality used within the realm of legislative jurisdiction, can play a similar role. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248–49 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

¹³⁰ *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982).

¹³¹ See, e.g., *Stevens v. Redwing*, 146 F.3d 538, 545–47 (8th Cir. 1998) (ruling that because inmate failed to present prima facie evidence showing that his claims were within the scope of the Missouri long-arm statute, there was no personal jurisdiction over defendants, but also determining that his causes of action were not legally sound).

¹³² See *Petters v. Petters*, 560 So. 2d 722, 724 (Miss. 1990) (“It is easy to see that Rule 12(b)(2) (personal jurisdiction) and Rule 12(b)(6) (failure to state a claim) inquiries are separate and distinct. A non-resident’s amenability to suit here in no way turns on the viability of the claim the plaintiff asserts. Conversely, that the plaintiff’s claim is without merit is never sufficient to establish lack of personal jurisdiction. The non-resident does not prevail on his Rule 12(b)(2) motion by convincing the court that the plaintiff’s suit is groundless.”) (citations omitted).

The threshold legal decision should not fix the law applicable on the merits in this or any future case; instead, the decision should determine only whether personal jurisdiction exists. At each step of the legal analysis on jurisdiction, the plaintiff should be able to survive by making some sort of plausible showing that might not measure up to more-likely-than-not. That is, the plaintiff should have to make only a plausible showing of a favorable outcome on the particular legal issue or, in other words, only a *prima facie* showing on the law that overlaps the merits.¹³³

Once again, the *prima facie* approach avoids the problems of the full-proof approach. It is true that the latter approach for jurisdictional issues of law does not pose judge/jury problems, and perhaps raises the *res judicata* and other problems in less intense form than for jurisdictional facts. But for jurisdictional issues of law that overlap the merits, the full-proof approach would open default judgments to subsequent attack for failure to state a claim, which would usually be unacceptable.

B. Extending Beyond Personal Jurisdiction to All Forum-Authority Requirements

1. *Territorial Jurisdiction, Service and Notice, and Venue*

So far the discussion has focused on personal jurisdiction. Yet the same considerations apply to nonpersonal jurisdiction of either the *in rem* or the quasi *in rem* variety.¹³⁴ If nonpersonal jurisdiction and the merits overlap as to an issue, then a lower standard should apply to that jurisdictional issue.¹³⁵ The reason for any seeming newness of this observation is not only that nonpersonal jurisdiction is

¹³³ See *Zeunert v. Quail Ridge P'ship*, 430 N.E.2d 184, 187 (Ill. App. Ct. 1981) ("When a defendant challenges jurisdiction, a court will make a preliminary inquiry as to whether the complaint states a legitimate cause of action 'to insure that acts or omissions which form the basis of a cause of action that is patently without merit will not serve to confer jurisdiction.'" (quoting *Wiedemann v. Cunard Line Ltd.*, 380 N.E.2d 932, 938 (Ill. App. Ct. 1978))); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 209 N.E.2d 68, 83 (N.Y. 1965) (Van Voorhis, J., concurring) ("I think that, without prejudice to the determination of questions of liability at the trial, enough has been shown to indicate the existence of a substantial controversy which if resolved in plaintiff's favor on the facts and the law, would warrant the assumption of jurisdiction under [the long-arm statute]. . . . Since products or some related form of liability (if established) would mean that the infant plaintiff's injuries arose out of the particular business transaction engaged in by the nonresident manufacturer in the purposeful circulation of this hammer in the stream of commerce in New York State, enough has been shown *prima facie* to warrant upholding jurisdiction to try this issue.").

¹³⁴ See 2 CASAD & RICHMAN, *supra* note 3, § 6-3.

¹³⁵ See *Fla., Dept. of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1345-46 (5th Cir. 1980) (applying a lower standard to ownership in the unusual situation where deciding who owns the thing determines whether *in rem* jurisdiction exists), *aff'd in part, rev'd in part*, 458 U.S. 670 (1982).

relatively uncommon but also that here overlap is a rare situation. For example, the location of the res usually does not overlap with the merits of the underlying claims to the res, meaning that the normal preponderance standard would usually apply to a jurisdictional challenge in the initial action or on subsequent attack.¹³⁶

The same considerations apply as well as to service and notice,¹³⁷ and even to venue.¹³⁸ Thus, for the usual issues involved in applying these threshold requirements, the plaintiff needs to make a showing of more-likely-than-not. But in the relatively rare cases for which these threshold issues overlap the merits, a *prima facie* standard should come to apply.

For a service and notice example of overlap, the plaintiffs in an automobile accident case served the nonresident defendants under the state's nonresident motorist statute on the basis that the other driver was allegedly the defendants' employee.¹³⁹ That employment issue, which incidentally reveals the often close relation of service to personal jurisdiction, was common to proper service and to the merits. In reversing a dismissal for improper service, the Tenth Circuit observed:

Turning now to appellants' contentions, Rule 12(d) of the Federal Rules of Civil Procedure clearly contemplates a preliminary hearing and determination of jurisdictional issues in advance of trial unless the court defers such action until the time of trial. Furthermore, as there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court. Certainly the trial court may gather evidence on the question

¹³⁶ See, e.g., *Durfee v. Duke*, 375 U.S. 106, 116 (1963) (holding that after active litigation of a quiet-title action, a determination by a Nebraska state court of the issue of jurisdiction over the land, resting on a questionable finding by a preponderance that the land on the banks of the shifting river was in Nebraska rather than Missouri, precluded a later attack by the defendant). Although the Supreme Court referred to the issue in *Durfee* as one of "jurisdiction over the subject matter," *id.* at 108, its characterization was sloppy. The issue there was conceptually one of quasi in rem jurisdiction over particular land, not one of general competence to hear quiet-title suits. Moreover, the policies at stake were those of territorial jurisdiction, not those of subject-matter jurisdiction. See generally RESTATEMENT (SECOND) OF JUDGMENTS §§ 10, 11 cmt. b, 12 (1982) (explaining territorial jurisdiction and subject-matter jurisdiction).

¹³⁷ See 2 CASAD & RICHMAN, *supra* note 3, §§ 6-1[4], 6-2[1][b]; 5B WRIGHT & MILLER, *supra* note 12, § 1353, at 345 (noting the situation when "factual issues [are] intertwined with the merits of the case" involving service and notice).

¹³⁸ See 2 MOORE ET AL., *supra* note 47, § 12.32[4]; 5B WRIGHT & MILLER, *supra* note 12, § 1352, at 324; cf. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1139 (9th Cir. 2004) ("The standard that we announce today also comports with the approach we have taken with other Fed. R. Civ. P. 12(b) motions. That the result is similar is not surprising based on our view of the practical realities that may often underlie Rule 12(b) motions: These motions are typically made early in litigation when the factual record is undeveloped and granting a Rule 12(b) motion will terminate the case in the selected forum.") (citations omitted).

¹³⁹ *Schramm v. Oakes*, 352 F.2d 143, 145 (10th Cir. 1965).

of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist, and based upon the evidence so obtained, decide the jurisdictional dispute before trial. One deviation from this procedure is in the case where the issue of jurisdiction is dependent upon a decision on the merits. In that circumstance, the trial court should determine jurisdiction by proceeding to a decision on the merits. The purpose of postponing a determination upon a jurisdictional question when it is tied to the actual merits of the case is to prevent a summary decision on the merits without the ordinary incidents of a trial including the right to jury. . . .

. . . .

While this is not meant to be an exhaustive review of the facts which might subject appellees to service of process, it does clearly show that the possibilities exist. At least this is the type of case where appellants should have the opportunity of proving jurisdiction during the trial on the merits and not be cut off at a preliminary hearing.¹⁴⁰

Thus, this case presented the same kind of problem that this Article has been addressing. The outcome is correct, even though the reasoning could have been clearer; the court could have recognized that, for service purposes, a *prima facie* standard applied to employment throughout the proceedings.

For a venue example, the Eleventh Circuit in an antitrust case held that "the plaintiff must present only a *prima facie* showing of venue."¹⁴¹ The venue issue was whether the claim arose in the Northern District of Georgia.¹⁴² Although the evidence was in conflict, the plaintiff's evidence showed that the defendants participated in a seemingly conspiratorial meeting there and that the injury seemingly occurred there.¹⁴³ That showing sufficed for the court to reverse a dismissal for improper venue.¹⁴⁴

2. *Subject-Matter Jurisdiction*

Even for the unique doctrine of subject-matter jurisdiction, with all its weighty concerns, the same considerations appear still to control. Thus, the proponent must prove issues by a showing of more-likely-than-not.¹⁴⁵ A prime example would be the citizenship of par-

¹⁴⁰ *Id.* at 149-50 (citations omitted).

¹⁴¹ *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988).

¹⁴² *See id.* at 855.

¹⁴³ *See id.* at 856.

¹⁴⁴ *See id.*

¹⁴⁵ *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); 5B WRIGHT & MILLER, *supra* note 12, § 1350, at 180-210.

ties in a diversity action.¹⁴⁶ But when the jurisdictional issues overlap the merits, a *prima facie* standard prevails.¹⁴⁷ A prime example of the latter situation might be a Federal Tort Claims Act¹⁴⁸ case in which the overlapping issue is whether the negligent sailor was “acting within the scope of his office or employment.”¹⁴⁹

One might argue that, in order to avoid prematurely forcing the court to delve too deeply into the merits, jurisdiction must be kept so completely separate from the merits that, albeit with some artificiality, any particular fact would go either to jurisdiction or to the merits.¹⁵⁰ The motivation for such an argument derives largely from a fear that jurisdiction must always be proved to a high standard of proof. But the argument ignores the possibility of adjusting downward the standard of proof when jurisdiction and the merits overlap, a possibility that the Supreme Court has blessed:

The argument, of course, assumes that the truth of jurisdictional allegations must always be determined with finality at the threshold of litigation, but that assumption is erroneous. Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements, and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection).¹⁵¹

It is true that problems of subject-matter jurisdiction are not often discussed in terms of standard of proof, but those terms have a powerfully clarifying effect on some familiar doctrines of subject-mat-

¹⁴⁶ See Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 699–700 (2005).

¹⁴⁷ See *Land v. Dollar*, 330 U.S. 731, 735 (1947) (“[A]lthough as a general rule the District Court would have [full] authority to consider questions of jurisdiction on the basis of affidavits as well as pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits.”) (footnote omitted); *Augustine v. United States*, 704 F.2d 1074, 1079 (9th Cir. 1983) (“Because the jurisdictional issue is dependent upon the resolution of factual issues going to the merits, it was incumbent upon the district court to apply summary judgment standards in deciding whether to grant or deny the government’s motion. That is, it was improper for the district court to grant the government’s motion unless the relevant facts were not in dispute and the government was entitled to prevail as a matter of law.”).

¹⁴⁸ 28 U.S.C. §§ 1346(b), 2671–2680 (2000).

¹⁴⁹ *Montez v. Dep’t of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) (“However, where issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits.”).

¹⁵⁰ See, e.g., Wasserman, *supra* note 146, at 693, 701 (noting that the federal court should resolve jurisdiction first, “before even peeking at the factual specifics of the plaintiff’s federal cause of action”).

¹⁵¹ *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537–38 (1995) (discussing admiralty jurisdiction) (citations omitted).

ter jurisdiction and on some of its new problems as well. The following five major examples will suffice to make this point, but it is worth noting that the same approach to standard of proof applies more broadly across all of subject-matter jurisdiction.¹⁵²

a. *Jurisdictional Amount*

Consider first the most prominent example, which just below its surface entails a standard of proof. On inquiry into jurisdictional amount, usually without discussion, the preponderance standard applies in the absence of other considerations.¹⁵³ But as usual, the court in deciding jurisdiction must avoid trying the merits. The standard therefore must be lowered to *prima facie* proof for issues that overlap the merits.¹⁵⁴ Indeed, such overlap is a very common occurrence here, because most of the jurisdictional amount inquiry involves weighing the claim's worth.

Thus, the well-known legal-certainty test¹⁵⁵ is actually a *prima facie* standard of proof. To satisfy the jurisdictional amount requirement in a diversity case where the plaintiff has pleaded a claim for more than \$75,000 against the defendant, the plaintiff needs to be able only to show a legal possibility that the judgment could exceed

¹⁵² See, e.g., *infra* notes 170 (fraudulent joinder), 176 (Alien Tort Statute analogies) & 199 (Title VII analogies). The *prima facie* approach may indeed apply beyond all these forum-authority requirements. See, e.g., *infra* notes 176 (legislative jurisdiction) & 190 (class action certification). But that extension would take us beyond the scope of this Article. See *supra* text accompanying note 58 (dividing all issues between forum authority and the merits).

¹⁵³ See *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936) (holding in an injunction suit that amount in controversy was the loss that would result from enforcement of challenged regulation, and observing: "The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.").

¹⁵⁴ See *Smithers v. Smith*, 204 U.S. 632, 645 (1907) ("lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial"); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (finding the lower court erred in ruling that there could be no lawful recovery of amount at least equal to the required amount in controversy, and erred in concluding that if a verdict in such amount were awarded, such verdict would be set aside for being excessive).

¹⁵⁵ See *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) ("It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."); 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3702 (3d ed. 1998); cf. 14C *id.* § 3725 (discussing the differing standards of proof in the removal setting).

\$75,000 under the applicable *law*.¹⁵⁶ Plaintiffs can pass this test very easily, especially in unliquidated tort cases, because jurisdiction will exist even though a recovery over \$75,000 is on the *facts* highly unlikely.¹⁵⁷ That is, because the jurisdictional amount and the merits overlap, courts ask for no more than a very modest factual showing to establish jurisdiction.¹⁵⁸ In order to rebut legal certainty, the plaintiff need establish only a legal possibility or, in other words, establish that a reasonable fact finder could award more than the jurisdictional amount. In sum, the legal-certainty test, as applied to the damages that might be recovered, is in essence a required factual showing of a reasonable possibility of exceeding the floor amount.¹⁵⁹

Some courts will at an early stage dismiss occasional cases in which requested damages are very flagrantly exaggerated, but all tests routinely more rigorous than the reasonably possible standard have proved impractical.¹⁶⁰ For example, a few courts, through some vague verbal formula, try to raise the bar, in effect by nudging the standard of proof up to a substantial possibility.¹⁶¹ But while courts are fairly adept at applying the reasonably possible standard, as they do on motion to dismiss or for summary judgment without full discovery and evidentiary hearing, courts would find curtailing the opponent's procedural opportunities for factual development to be more questionable as the standard elevates to substantial possibility or above.

¹⁵⁶ See *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403 (9th Cir. 1996) (dictum) ("[A]pplication of the 'converse legal certainty' test in these circumstances would force the federal court to exercise jurisdiction even if there was only a *legal possibility* that the amount in controversy exceeded [the statutorily required amount].").

¹⁵⁷ See *Wade v. Rogala*, 270 F.2d 280, 285 (3rd Cir. 1959) (finding in a tort case that the claimed damages passed the legal-certainty test, and observing: "The necessary choice, except in the flagrant case, where the jurisdictional issue cannot be decided without the ruling constituting at the same time a ruling on the merits, is to permit the cause to proceed to trial. Even then, unless the court were convinced that the plaintiff was never entitled to the jurisdictional amount, and his claim was therefore asserted only for the purpose of gaining jurisdiction, dismissal on jurisdictional grounds would not be justified.") (citations omitted).

¹⁵⁸ See *id.* (observing that "since the issue of jurisdictional amount in this case is so closely tied to the merits of the cause, insistence upon evidence with respect thereto must be limited").

¹⁵⁹ See *Fireman's Fund Ins. Co. v. Ry. Express Agency, Inc.*, 253 F.2d 780, 784 (6th Cir. 1958) ("Where the jurisdictional issue as to amount in controversy can not be decided without the ruling constituting at the same time a ruling on the merit of the case, the case should be heard and determined on its merits through regular trial procedure."); Stefania A. Di Trolio, Comment, *Undermining and Untwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 SETON HALL L. REV. 1247, 1264 n.142, 1280 n.234 (2003) (discussing cases where the jurisdictional issues are intertwined with the merits).

¹⁶⁰ See 14B WRIGHT, MILLER & COOPER, *supra* note 155, § 3707.

¹⁶¹ See, e.g., *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971) (seeming to require, by its analogies to the new-trial test that equates the jury's clear error to its having decided in the absence of a substantial possibility, a showing of a substantial possibility of exceeding the jurisdictional minimum); see also Clermont, *Procedure's Magical Number Three*, *supra* note 1, at 1126-28 (discussing the different standards of review).

Moreover, an elevated standard would more often necessitate jurisdictional dismissals during or after trial, when the facts get better developed. These difficulties are unacceptable, and therefore the workable legal-certainty test prevails. But the ongoing debate is so much more comprehensible if framed in terms of the standard of proof.

Moving beyond issues of fact in applying the legal-certainty test, courts should also require only a *prima facie* showing on issues of law that overlap the merits. It is already clear that the plaintiff need not survive the usual demurrer test for the legal sufficiency of the claim, or show the absence of valid defenses, in order to establish that liability exists sufficiently for jurisdictional purposes and that the judgment could therefore legally exceed the jurisdictional amount.¹⁶² Similarly, the plaintiff need not establish by a more-likely-than-not standard the measure of damages under the applicable law; for example, even if the availability of punitive damages remains unclear, a big enough claim for them will nevertheless support jurisdiction.¹⁶³

As courts move toward considering exclusive-remedy or limitation-of-liability provisions in the course of applying the legal-certainty test, however, they show more confusion.¹⁶⁴ For example, one court, in recently granting a Rule 12(b)(1) motion based on lack of the jurisdictional amount, engaged in a full-fledged consideration of the applicability and enforceability of a contractual ceiling on damages.¹⁶⁵ The court rejected the plaintiff's argument "that the liquidated damages provision does not apply because: (1) [the plaintiff] is seeking direct damages and this provision does not limit its recovery of direct damages; (2) it is unenforceable due to [the defendant's] willful and/or bad faith breach of the contract; and (3) it is unenforceable because it is contrary to the public policy embodied in the Kansas Salesperson Commission Statutes."¹⁶⁶ To do so, the court was perfectly willing to resolve "questions of law and disputed jurisdictional facts" on "a juris-

¹⁶² See *Bell v. Hood*, 327 U.S. 678 (1946); *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

¹⁶³ See *Columbia Pictures Corp. v. Grengs*, 257 F.2d 45, 47 (7th Cir. 1958) (upholding jurisdiction because plaintiffs' alleged actual and punitive damages exceeded the statutory requirement); see also *Calhoun v. Ky.-W. Va. Gas Co.*, 166 F.2d 530, 531 (6th Cir. 1948) (upholding jurisdiction despite "very real controversy in respect to the applicable law of Kentucky" on damages); *Duhon v. Conoco, Inc.*, 937 F. Supp. 1216, 1222 (W.D. La. 1996) (upholding jurisdiction "where it is unclear as to whether state law precludes recovery").

¹⁶⁴ See, e.g., *Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001) (allowing, on jurisdictional attack, full legal testing of whether workers' compensation was exclusive remedy); cf. *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1225-26 (10th Cir. 2004) (applying lowered standard of proof to factual dispute on exclusivity of workers' compensation).

¹⁶⁵ *LDCircuit, LLC v. Sprint Commc'ns Co.*, 364 F. Supp. 2d 1246, 1263 (D. Kan. 2005) (refusing also to count damages for tortious interference claim that was "patently without merit").

¹⁶⁶ *Id.* at 1251.

dictional issue that was logically distinct from whether the defendant breached its contractual duties.”¹⁶⁷

Other courts manage to avoid this confusion. They have recognized the undesirability of getting into the merits on a jurisdictional motion. In particular, the Second Circuit has refused to go that route, although it has rested its refusal on the shaky reason that the limitation-of-liability provision is an affirmative defense and thus off-limits altogether on jurisdiction, even as to jurisdictional amount.¹⁶⁸

The better approach—which incidentally is in the nature of a compromise between these two lines of precedent—would be to require, on overlapping fact or law, only a *prima facie* showing to establish jurisdictional amount, with the case then moving on to the merits.¹⁶⁹

b. *Substantiality Rule*

The same approach of a *prima facie* standard of proof helps explain the so-called substantiality rule, under which the basis of a federal-question claim must be substantial—that is, sufficiently meritorious.¹⁷⁰ This restriction requires little to avoid dismissal on ju-

¹⁶⁷ *Id.* at 1254.

¹⁶⁸ *See, e.g.,* *Zacharia v. Harbor Island Spa, Inc.*, 684 F.2d 199, 203 (2d Cir. 1982) (rejecting relevance to amount in controversy of arguably applicable statutory cap on damages); *cf. Scherer v. Equitable Life Assurance Soc’y of the United States*, 347 F.3d 394, 398–99 (2d Cir. 2003) (disallowing use of *res judicata*, an affirmative defense, to whittle down the amount in controversy).

¹⁶⁹ *See* *Pratt Cent. Park Ltd. P’ship v. Dames & Moore, Inc.*, 60 F.3d 350, 362–63 (7th Cir. 1995) (Flaum, J., dissenting) (“But where the plaintiff has presented more than a colorable issue regarding the amount in controversy, courts should accept that presentation and move on. Otherwise, we are encouraging too much jurisdictional maneuvering at the outset of litigation.”).

¹⁷⁰ *See* *Bell v. Hood*, 327 U.S. 678, 684–85 (1946) (finding a weak claim to be nevertheless substantial enough); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 108 (1933) (granting dismissal in an injunction case because the claim set forth in the pleading was not substantial).

The principal manifestation of the fraudulent joinder doctrine, which facilitates removal of diversity cases, traditionally took the form of a converse of the substantiality rule. *See generally* 14 WRIGHT, MILLER & COOPER, *supra* note 155, § 3641, at 169–89 (discussing treatment of various fraudulent joinder scenarios); 14B *id.* § 3723, at 576–80, 625–58 (describing the historical development of the fraudulent joinder doctrine and its policy underpinnings). That is, to invoke it, the defendant would show that the claim involving the party impeding removal was factually or legally frivolous and was pretextual: the defendant had the burden of showing that its position on the merits was strong enough to remove reasonable doubt, and also that the plaintiff had the equivalent of an intent to deceive. *See* *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 185–86 (1907) (upholding removal because one of the defendants was wrongfully joined for the sole purpose of defeating the defendants’ right to remove the case). But some lower courts of late, in addition to imposing other restraints on devices to destroy federal jurisdiction, have expanded the fraudulent joinder doctrine: they seem to be moving toward putting the burden on even the innocent plaintiff to make a showing sufficient to survive a supported motion for summary judgment, with a nonfrivolous showing on the facts and a full showing

risdictional grounds: it means that the federal element must not be factually immaterial, in the sense of being without substance and tacked on only to get into federal court; it also means that the federal claim cannot be legally frivolous, in the sense of being laughably weak and asserted to establish federal jurisdiction. In this traditional formulation, the plaintiff's motive in employing a federalized formulation of the claim seemingly plays a role, but in reality no court would sustain an immaterial or frivolous claim asserted with innocent motive, or dismiss a material and nonfrivolous claim asserted merely to get into federal court.¹⁷¹ In sum, under the inaptly named substantiality rule, the party invoking federal jurisdiction need show no more than the claim's factual and legal viability to a reasonable possibility, not even having to show a substantial possibility of success.

Of course, even a "substantial" claim, after it has survived this lenient threshold jurisdictional test that requires only a *prima facie* showing, may very well fail on the merits:

[I]f the plaintiff raises a substantial federal question, the court has jurisdiction of the case and its decision must go to the merits of the case. Jurisdiction is not lost because the court ultimately concludes that the federal claim is without merit. The complaint still may be dismissed on motion but the dismissal then is one for failure to state a claim on which relief can be granted rather than dismissal for want of jurisdiction.¹⁷²

Perhaps, however, this example of the substantiality rule appears to disprove the analogy of subject-matter to personal jurisdiction. After all, the reason for the substantiality restriction lies in keeping the plaintiff from using an insubstantial claim to get a foot in the federal courthouse door, a foot that would allow the plaintiff to inject supplemental state claims into the federal court. This *raison d'être* might therefore suggest that subject-matter jurisdiction really is different from personal jurisdiction for these purposes. Yet, a determination that personal jurisdiction exists likewise can open the door to supple-

on the law. See, e.g., *Rose v. Giamatti*, 721 F. Supp. 906, 923–24 (S.D. Ohio 1989) (upholding removal because the real controversy was between plaintiff baseball player and defendant baseball commissioner, rather than with the other defendants); E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189 (2005). This expansion has come without statutory authorization and appears to be undesirable. See generally Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119 (2006); James F. Archibald III, Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377 (1992). The undesirability only grows in this era of increasingly abusive removal. See generally Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551 (2005).

¹⁷¹ See *Hagans v. Lavine*, 415 U.S. 528, 536–43 (1974) (omitting reference to motive when determining whether a federal court has jurisdiction over a claim).

¹⁷² 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3564, at 73–74 (2d ed. 1984).

mental service.¹⁷³ More pertinently, to the extent that special considerations linked to subject-matter jurisdiction are present, the court can account for them in setting the appropriate level of the required *prima facie* showing.¹⁷⁴ Thus, the substantiality rule remains a good example of a lowered standard of proof on a jurisdictional issue that overlaps the merits. The court avoids deciding the merits in the guise of determining jurisdiction, and the reasonably possible standard suffices to protect from abuse of supplemental jurisdiction.

c. *Alien Tort Statute*

So this simple approach to standard of proof applies broadly. Nevertheless, life is inescapably complicated. Thus, a hierarchy of jurisdictional issues exists for subject-matter jurisdiction, just as it does for personal jurisdiction.¹⁷⁵ Courts have not been explicit in specifying their choice among the possible meanings of *prima facie* proof in each context of subject-matter jurisdiction. But one can see the hierarchy by comparing the substantiality rule to the Alien Tort Statute (ATS).¹⁷⁶

This ancient statute bestows jurisdiction for federal common law tort actions, which are drawn with great judicial restraint from international law.¹⁷⁷ Under the ATS, a foreigner can sue a foreigner for a

¹⁷³ See *supra* text accompanying note 40.

¹⁷⁴ See *infra* Part II.B.2.c.

¹⁷⁵ See *supra* Part I.B.4.

¹⁷⁶ 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."); cf. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172–73 (5th Cir. 1994) (discussing Foreign Sovereign Immunities Act); *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1519–20 (D.D.C. 1984) (drawing analogy to other special federal jurisdictional statutes that impose a heightened standard on one or more jurisdictional issues that overlap the merits).

A similar example comes from the realm of legislative jurisdiction, which lies close to subject-matter jurisdiction. In order for federal subject-matter jurisdiction to exist in, say, an extraterritorial antitrust case, it is virtually necessary for the legislature to have prescribed a cause of action for this plaintiff. Thus, in this extraterritorial setting and on this particular point of legal sufficiency, the standards for subject-matter and legislative jurisdiction are nearly equivalent. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795–96 (1993); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 749 F.2d 1378, 1383 (9th Cir. 1984); cf. *"In" Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494, 499 n.5 (M.D.N.C. 1987) (stating that allegations on factual issues that overlap between jurisdiction and merits are to be accepted for jurisdictional purposes). The result for such extraterritorial jurisdiction, just as for ATS jurisdiction, is that the court should give rather searching scrutiny to legal sufficiency, although not to factual issues that overlap the merits.

¹⁷⁷ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 724 (2004); William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 *TULSA J. COMP. & INT'L L.* 87, 88 (2004) (stating that *Sosa* "reaffirmed that 'the domestic law of the United States recognizes the law of nations' and characterized customary international law as 'federal common law' for purposes of the Alien Tort Statute"); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of*

tort occurring abroad.¹⁷⁸ But if the ATS required only that the cause of action be not legally frivolous, the federal courthouse doors would be open too wide to related claims under state or foreign law. The alien plaintiff could simply allege a violation of the law of nations supposedly incorporated in the federal common law, taking refuge in this legal area's being confused enough that virtually no cause of action is laughably weak, and then pursue relief much more surely available under law other than federal common law. And so the United States' courts would indeed become the forum for the world's human-rights litigations.

Consequently, the federal courts have beefed up the required legal showing of a tort in violation of the law of nations:

The paucity of suits successfully maintained under the section is readily attributable to the statute's requirement of alleging a "*violation of the law of nations*" (emphasis supplied) at the jurisdictional threshold. Courts have, accordingly, engaged in a more searching preliminary review of the merits than is required, for example, under the more flexible "arising under" formulation. Compare *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 52 (1907) (question of Alien Tort Statute jurisdiction disposed of "on the merits") (Holmes, J.), with *Bell v. Hood*, 327 U.S. 678 (1946) (general federal question jurisdiction not defeated by the possibility that the averments in the complaint may fail to state a cause of action). Thus, the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.¹⁷⁹

Thus, to establish subject-matter jurisdiction, the plaintiff must go beyond showing that the claim is substantial and establish that it is legally viable.¹⁸⁰

International Human Rights Litigation in U.S. Courts, 57 VAND. L. REV. 2241, 2245 (2004) (asserting that courts must be careful to avoid "an expansive reading of the statute" and must "determine which human rights claims 'rest on the norm of international character accepted by the civilized world'").

¹⁷⁸ See 28 U.S.C. § 1350 (2000).

¹⁷⁹ *Filártiga v. Peña-Irala*, 630 F.2d 876, 887–88 (2d Cir. 1980); *cf. id.* at 889 n.25 (noting that any later decision to apply foreign law would not oust jurisdiction: "Such a decision would not retroactively oust the federal court of subject matter jurisdiction, even though plaintiff's cause of action would no longer properly be 'created' by a law of the United States. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.). Once federal jurisdiction is established by a colorable claim under federal law at a preliminary stage of the proceeding, subsequent dismissal of that claim (here, the claim under the general international proscription of torture) does not deprive the court of jurisdiction previously established.").

¹⁸⁰ This heightened standard of decision is close to, or the same as, the more-likely-than-not standard that applies under FED. R. CIV. P. 12(b)(6). See *Kadic v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995) ("Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter juris-

In contrast to legal issues overlapping the merits of an ATS case, this heightened standard does not apply to jurisdictional facts overlapping the merits.¹⁸¹ Thus, there is a hierarchy of jurisdictional issues, within which “prima facie” conveys different meanings.

d. *Class Action Fairness Act*

The proposed approach so puts the familiar rules of legal-certainty and substantiality in a revealing light, while also helping to read a very old and troublesome statute. It can illuminate new problems, too. An example comes in examining how the controversial Class Action Fairness Act of 2005 (CAFA) might work.¹⁸²

One of CAFA’s purposes was to get state class actions into federal court, where federal judges would supposedly take a more disciplined approach to class certification.¹⁸³ Thus, the statute provides for removal to federal court of certain cases filed as class actions in state court.¹⁸⁴

What happens if, after removal, the federal judge does indeed deny class certification: does the case stay in federal court, or does that court dismiss for lack of federal jurisdiction?¹⁸⁵ I think that the denial of certification will not oust jurisdiction, because the court reached a determination that the case was a class action for jurisdic-

dition under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).”). Incidentally, the same heightened standard on the law applies to the other part of the ATS that treats claims of violation of a treaty. See *Bagguley v. Bush*, 953 F.2d 660, 663 (D.C. Cir. 1991).

¹⁸¹ See *Sarei v. Rio Tinto plc*, 221 F. Supp. 2d 1116, 1130–31 (C.D. Cal. 2002).

¹⁸² Pub. L. No. 109-2, 119 Stat. 4 (2005); see Georgene M. Vairo, *Class Action Fairness Act of 2005: With Commentary and Analysis by Georgene M. Vairo of the Moore’s Federal Practice Board of Editors* (Loyola Law Sch. (Los Angeles) Legal Studies, Paper No. 2005-22, 2005), available at <http://ssrn.com/abstract=806405>; Anna Andreeva, Student Article, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385 (2005).

¹⁸³ See S. REP. NO. 109-14, at 14, 22 (2005) (referring, in a report issued after enactment, to “the ‘I never met a class action I didn’t like’ approach to class certification” in some state courts); Rick Knight, *The Class Action Fairness Act of 2005: A Perspective*, FED. LAW., June 2005, at 46 (analyzing and evaluating the Act); Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1522–23 (2005) (discussing law makers’ actual motivations).

¹⁸⁴ Pub. L. No. 109-2, § 5(a), 119 Stat. 4, 12 (2005) (codified at 28 U.S.C. § 1453); see Adam N. Steinman, *Sausage-Making, Pigs’ Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. (forthcoming 2006), available at <http://ssrn.com/abstract=802764>.

¹⁸⁵ The same problem can arise in a case brought as a class action originally in federal court. See Pub. L. No. 109-2, § 4(a)(2), 119 Stat. 4, 9 (2005) (codified at 28 U.S.C. § 1332(d)); David F. Herr & Michael C. McCarthy, *The Class Action Fairness Act of 2005—Congress Again Wades into Complex Litigation Management Issues*, 228 F.R.D. 673, 679 (2005) (noting the problem). Indeed, the problem is then cleaner, because there can be no hiding behind a notion that class action status under state law is a different issue from class action status under federal law. In both removal and original jurisdiction, the burden of proof should be on the proponent of federal jurisdiction. See Georgene M. Vairo, *Is CAFA Working?*, NAT’L L.J., Nov. 14, 2005, at 12.

tional purposes under a different and lower standard of proof than the determination that the case was not a class action for certification purposes; accordingly, the removed but uncertified case will stay in the federal court as an individual action until someone ushers it out, as by a voluntary dismissal.¹⁸⁶ And if the plaintiff refiles the case as a class action in state court, it is again subject to removal to federal court, where preclusion will presumably apply to both jurisdiction and certification issues.¹⁸⁷ The bottom line, which is consonant with the drafters' purposes, is that an action within the statute's coverage that previously could have gone forward in state court as a class action will no longer proceed as a class action, even in state court, unless it meets federal certification requirements.

Nevertheless, this removal problem has bedeviled the listserve for civil procedure professors. Some found it illogical to apply a different meaning of "class action" for jurisdiction and for certification:

[There is] the idea that under CAFA a civil action can be class action for purposes of jurisdiction, but not be a class action for purposes of certification. . . . But accepting the possibility, then a civil action can, under federal law, be a class action and not be a class action at the same time. On contemplating this possibility, it occurred to me that the authors of the CAFA must have been deeply into Zen. Perhaps the whole point of CAFA is to break the back of logic, leading us to a higher state of procedural awareness that will arise only upon deep meditation of this nonsense.¹⁸⁸

The logical fog dissipates upon expressing the different meanings in terms of the required showings. For jurisdiction, the court might demand merely a good-faith allegation of a class action.¹⁸⁹ For certifi-

¹⁸⁶ Previous versions of the bill had provided a basis for dismissal, but the enacted version omits that provision without explanation. For example, the 2003 CAFA bill provided, in relevant part:

(7)(A) A district court shall dismiss any civil action that is subject to the jurisdiction of the court solely under this subsection if the court determines the action may not proceed as a class action based on a failure to satisfy the prerequisites of rule 23 of the Federal Rules of Civil Procedure.

(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal court or filing an action in State court, except that any such action filed in State court may be removed to the appropriate district court if it is an action of which the district courts of the United States have original jurisdiction.

S. 274, 108th Cong. § 4(a)(2) (2003) (as reported by S. Comm. on the Judiciary, July 31, 2003).

¹⁸⁷ See CLERMONT, *supra* note 4, § 4.4(B) (discussing the res judicata effects of a jurisdictional determination); cf. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767-69 (7th Cir.) (taking a broad view of preclusion by class-certification decision), *on remand*, 271 F. Supp. 2d 1080 (S.D. Ind. 2003).

¹⁸⁸ Posting of Allan Ides, Professor, Loyola Law School, to Civil Procedure Listserve, civpro@law.wisc.edu (Feb. 26, 2005) (on file with author) (quoted with permission).

¹⁸⁹ See S. REP. NO. 109-14, at 44 (2005) (suggesting a limited factual inquiry on other CAFA jurisdictional issues); 151 CONG. REC. H729 (2005) (same).

cation, the plaintiff usually must show by a preponderance that the case satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.¹⁹⁰ Then, there is no difficulty in saying that the suit is sufficiently a class action to support removal, but not certifiable so as to proceed to judgment as a class action.

e. *Title VII*

The definitive word on the standard of proof for jurisdiction could have come this year in *Arbaugh v. Y & H Corp.*¹⁹¹ In that case, a female former bartender/waitress brought a federal action under Title VII of the Civil Rights Act of 1964 against a New Orleans restaurant, the Moonlight Café, alleging sexual harassment by one of its owners.¹⁹² The jury awarded the plaintiff \$40,000.¹⁹³ Then, after judgment, the defendant sought for the first time to dismiss for lack of subject-matter jurisdiction, arguing that the restaurant did not satisfy Title VII's definition of an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees."¹⁹⁴ After additional discovery, the district court dismissed, explaining that the Moonlight Café lacked the requisite number of employees because the calculation should be exclusive of the restaurant's delivery drivers and its owners.¹⁹⁵ The court of appeals affirmed.¹⁹⁶ The Supreme Court unanimously—and correctly—reversed.¹⁹⁷

Should the defendant be able so late in the case to render the proceedings for naught by suddenly raising subject-matter jurisdiction? Yes. Should the court as part of the jurisdictional determination decide under a preponderance standard this fact-intensive issue of a sufficient number of employees? No. But the Supreme Court reached that result on the narrow ground that the particular statutory requirement was not jurisdictional at all, because Congress had not "clearly state[d] that a threshold limitation on a statute's scope shall

¹⁹⁰ See L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1048–51 (2004); cf. *Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24, 36–37 (N.D. Cal. 1977) (mentioning the possibility of overlap of certification issues with merits and hence the need to avoid foreclosing the merits).

¹⁹¹ 546 U.S. ____, 126 S. Ct. 1235 (2006). The question presented was this: "Section 701(b) of Title VII of the 1964 Civil Rights Act applies the Title VII prohibition against employment discrimination to employers with fifteen or more employees. Does this provision limit the subject matter jurisdiction of the federal courts, or does it only raise an issue going to the merits of a Title VII claim?" Petition for a Writ of Certiorari at *i, *Arbaugh v. Y & H Corp.*, 546 U.S. ____, 125 S. Ct. 2246 (2005) (No. 04-944), 2005 WL 83275.

¹⁹² See *Arbaugh*, 546 U.S. at ____, 126 S. Ct. at 1240.

¹⁹³ See *id.* at 1241.

¹⁹⁴ 42 U.S.C. § 2000e(b) (2000); see 546 U.S. at ____, 126 S. Ct. at 1240.

¹⁹⁵ See 546 U.S. at ____, 126 S. Ct. at 1241.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 1245.

count as jurisdictional.”¹⁹⁸ The Court left untouched the broader question of how to handle an issue that does seem to overlap jurisdiction and merits.

Howard Wasserman has written impressively and exhaustively on this broader question.¹⁹⁹ His solution is always to separate completely issues of subject-matter jurisdiction from those on the merits: if an issue is jurisdictional, the proponent must prove it by a preponderance; if it instead is on the merits, the proponent need not prove it at all as a matter of jurisdiction, either at the threshold or later.²⁰⁰ He views jurisdiction and merits as distinct exercises of different powers, with the former resting on the structural powers of Congress to specify the federal courts’ jurisdiction over classes of cases and with the latter resting on the constitutional powers to create causes of action for relief.²⁰¹ He draws the dividing line so that any issue that the federal plaintiff would have to establish in order to prevail on an identical action in state court is an issue on the merits, and so is not jurisdictional.²⁰²

Although I agree that Professor Wasserman’s “categorical approach” gives the correct answer in the *Arbaugh* case, I disagree with his approach as a general solution. It has three principal failings. First, the categories of subject-matter jurisdiction and the merits are in reality not exclusive sets of issues, but instead can overlap.²⁰³ The simple proof is that Congress could have expressly provided in Title VII both that jurisdiction requires more than fifteen employees and that the plaintiff must establish more than fifteen employees to prevail on the merits.²⁰⁴ Therefore, the system must provide for treating issues

¹⁹⁸ *Id.*

¹⁹⁹ See Wasserman, *supra* note 146. Besides discrimination statutes modeled on Title VII, his prime examples of potentially overlapping jurisdiction and merits are “the requirement of an agreement in restraint of trade affecting commerce under the Sherman Anti-trust Act and the requirement of action under color of state law in constitutional claims under 42 U.S.C. § 1983.” *Id.* at 645–46 (footnotes omitted).

²⁰⁰ See *id.* at 693, 701.

²⁰¹ See *id.* at 673–78, 691–92.

²⁰² See *id.* at 702. A very similar solution was proposed by Di Trollo, *supra* note 159, at 1280–81, but that comment-writer’s concern was exclusively with the risk of infringing on the jury right. See *id.* at 1247–48, 1272–73.

²⁰³ See Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614 (2003) (arguing that jurisdiction is not inherently different from the merits and that “the line between jurisdictional issues and merits issues is always at some level arbitrary”).

²⁰⁴ See Wasserman, *supra* note 146, at 692 (seeming to concede this point). More authoritatively, the *Arbaugh* Court recognized this truth. See 546 U.S. at ___, 126 S. Ct. at 1245 (“Of course, Congress could make the employee-numerosity requirement ‘jurisdictional,’ just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332.”). *Arbaugh*’s clear-statement rule will reduce the incidence of overlap, but will mainly affect peripheral statutory issues. Indeed, the Court listed numerous examples where subject-matter jurisdiction and the merits still do overlap. *Id.* at 1245 n.11.

that fall into both areas. Second, some jurisdictional provisions not only *could* be written in merits terms but also *must* be, because constitutional provisions on the judicial power often speak not merely of classes of cases but of classes of cases based on a certain type of claim.²⁰⁵ Determining, for example, whether a claim arises under federal law requires a glance at the scope of federal law, in order to keep federal courts from unconstitutionally exercising universal jurisdiction upon pro forma allegations.²⁰⁶ Therefore, some inquiry into the merits is unavoidably part of many jurisdictional determinations. Third, moving all issues on the merits completely out of the realm of jurisdiction would open the door wide to abuse of supplemental jurisdiction.²⁰⁷ If the merits were irrelevant to jurisdiction, a totally meritless federal claim could support federal jurisdiction for related state claims.²⁰⁸ Therefore, an additional and related reason exists to make some inquiry into the merits a part of many jurisdictional determinations.

Accordingly, I think it better to side with those judges who have recognized that certain issues common to subject-matter jurisdiction and the merits may exist and that these issues require special handling.²⁰⁹ The proponent on these issues need make no more than a *prima facie* showing for jurisdictional purposes. Proof by a preponderance and testing by demurrer would await adjudication on the merits.

Under this general approach, even if Congress had made the number of employees jurisdictional, Jenifer Arbaugh would ultimately have retained her verdict. She could have made a *prima facie* showing that the restaurant had a sufficient number of employees for jurisdictional purposes, because that showing would have involved at most

²⁰⁵ See, e.g., U.S. CONST. art. III, § 2 (reaching claim-based realms as well as party-based realms).

²⁰⁶ See Wasserman, *supra* note 146, at 693–94 (seeming to concede this point); cf. *supra* note 176 (treating legislative jurisdiction).

²⁰⁷ See *supra* text accompanying notes 170–72. Likewise, the judge would become unable to invoke FED. R. CIV. P. 12(h)(3) in order to raise the issues *sua sponte*.

²⁰⁸ See Di Trolio, *supra* note 159, at 1279–80 (recognizing need for substantiality rule). But see Wasserman, *supra* note 146, at 701 n.284 (disapproving of *Bell v. Hood*, 327 U.S. 678 (1946)).

²⁰⁹ See *Morrison v. Amway Corp.*, 323 F.3d 920, 929–30 (11th Cir. 2003) (stating that status as employer “implicated both jurisdiction and the underlying merits of Appellant’s FMLA claim,” and so jurisdiction exists if plaintiff produces *prima facie* proof, which here means sufficient evidence to survive a supported motion for summary judgment); *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 978 (10th Cir. 2002) (holding in an ADA case that jurisdiction and merits are intertwined when the same statute grants subject-matter jurisdiction and provides the substantive claim); *Garcia v. Copenhaver, Bell & Assocs., M.D.’s*, 104 F.3d 1256, 1266 (11th Cir. 1997) (ruling that the question of whether defendant “is an ‘employer’ under ADEA provides the basis for both subject matter jurisdiction and the substantive claim for relief,” and so jurisdiction exists if plaintiff has raised a genuine issue).

a showing of reasonable possibility, that is, a showing sufficient to raise a genuine issue on the facts and to establish nonfrivolity on the law. Given jurisdiction, it was too late, after judgment, for the Moonlight Café to raise on the merits whether there really were fifteen employees in fact and in law.

CONCLUSION

From a morass of confused cases on a procedural point of significance, there emerges a startlingly clear rule that covers jurisdictional fact, and much more. On any factual element or legal question of forum authority, from subject-matter jurisdiction to venue whenever properly challenged, the proponent of forum authority must make the usual showing of more-likely-than-not, subject to this exception: if that element or question overlaps the merits of the claim, the proponent need provide only *prima facie* proof to establish the forum's authority. Depending on the particular threshold issue's importance, "*prima facie*" might mean any of the standards below the more-likely-than-not standard, namely, slightest possibility, reasonable possibility, substantial possibility, or equipoise. That lower standard will allow the judge to decide efficiently but definitively whether the forum has authority to decide the merits—doing so without entailing or foreclosing any decision on the merits, a decision to which a higher standard would apply.